WestPac Electric, Inc. *and* Darrell Chapman *and* Jim Shepler *and* Local Unions Nos. 46, 76, and 191, International Brotherhood of Electrical Workers *and* Local Union No. 191, International Brotherhood of Electrical Workers *and* Local Union No. 46, International Brotherhood of Electrical Workers. Cases 19–CA–22891, 19–CA–22930, 19–CA–22956, 19–CA–22957, 19–CA–23000, 19–CA–22999, 19–CA–23097

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 9, 1995, Administrative Law Judge Timothy D. Nelson issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief to the General Counsel's submission.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] to modify the remedy, and to adopt his recommended Order as modified and set forth in full below.[4]

We note that the complaint alleges that the Respondent refused to hire the 29 union-referred job applicants. Although the judge specifically found that the Respondent's refusal to hire these applicants was discriminatory, he directed in his remedy that the Respondent ''give each of them nondiscriminatory consideration for hire to current and future jobs'' and stated that ''the identities of such applicants . . . [would] be determined in the compliance stage.'' However, the appropriate remedy for a refusal to hire in these circumstances is reinstatement and backpay subject to *Dean General Contractors*, 285 NLRB 573 (1987), considerations set out below. See *Casey Electric*, 313 NLRB 774 (1994). It is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct. See, e.g., *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). Thus, even though neither the General Counsel nor the Unions have excepted to the judge's failure to provide the proper remedy for the violation alleged and found, we shall require that the Respondent hire and make whole the 29 applicants whom it discriminatorily refused to hire because of their union affiliation or perceived sympathies, subject to *Dean General Contractors*, below. Contrary to the dissent's view, we will not allow the Respondent to show in compliance that it would have rejected any of the discriminatees for lawful reasons even if it had considered hiring these job applicants. As stated, the complaint clearly put the Respondent on notice of the refusal to hire allegations set forth there and our colleague concedes this is what the General Counsel alleged. Thus, we conclude that the Respondent had sufficient opportunity to present evidence on this subject during the unfair labor practice hearing in this case and should not be afforded a second chance to defend its unlawful conduct in compliance. For these reasons, we shall modify the judge's order and notice to reflect our change in the remedy.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, we shall order the Respondent to cease and desist therefrom and to take cer-

[1] The judge subsequently issued an erratum on December 6, 1995.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that at sec. V,F,3,a(1), par. 2, which directly precedes the chart listing the ''daily hours for Burlington workers August 30 through September 2,'' the judge inadvertently states that the calendar week covered there ended on ''Sunday, August 5,'' whereas the correct date should read Sunday, September 5. Furthermore, in examining the data provided by that chart, the judge states that on Tuesday (August 31) the six returning strikers worked a standard 8-hour shift while all the nonstrikers, except Ashton, worked a 9-hour shift. We note, however, that nonstriker J. Killebrew also did not work a 9-hour shift on August 30 as the chart shows that he worked only 8.5 hours that day. Finally, in the penultimate sentence of the fourth paragraph of his discussion entitled ''The September 3–7 'unfair labor practice' strike,'' the judge states that the ''Regional Director mailed a copy of the strikers' August 3 unfair labor practice charge to the Respondent,'' whereas the record shows that the correct date should read September 3. Nevertheless, we stress that corrrection of these misstatements is insufficient to affect the judge's ultimate conclusions in this case and, in particular, we agree with the judge that the chart described above establishes that the Respondent did not afford returning strikers the same opportunities for extra hours as it gave to nonstrikers.

[3] We stress, in adopting the judge, that his finding that the alleged discriminatees against whom the Respondent discriminated in this case were statutory employees is entirely consistent with the Supreme Court's decision in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

In adopting the judge's findings that the Respondent coercively interrogated both employees on the job and applicants for employment, Chairman Gould and Member Browning find it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[4] Additionally, we modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

tain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged 11 employees and discriminatorily failed and refused to hire 29 named job applicants, we shall order it to offer them reinstatement or employment to the same or substantially equivalent positions in which the Respondent previously employed them or for which they applied, without prejudice to any seniority or any other rights or privileges previously enjoyed or to which they would have been entitled in the absence of the Respondent's hiring discrimination. Additionally, we shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them, from the date of the discharge in the case of the 11 discharged employees or, in the case of the job applicants from the date they applied for employment, to the date that the Respondent makes them a valid offer of reinstatement or employment. The Respondent also will reimburse the former strikers for any loss of earnings they suffered because the Respondent unlawfully delayed their reinstatement after the strikers unconditionally offered to return to work and refused to give the returning strikers the same work opportunities, including overtime work, that it made available to nonstrikers, new hires, and transferees from other projects. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This Order is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, supra. Consistent with that decision, the Respondent will have the opportunity in compliance to show that, under its customary procedures, the 11 discharged employees' or the 29 job applicants' positions would not have been transferred to another jobsite after the projects on which the discrimination occurred were completed, and that therefore no backpay and reinstatement obligation exists beyond the time when the Respondent finished those particular projects.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as moified and set forth in full below and orders that the Respondent, WestPac Electric, Inc., Woodinville, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies or activities or other statutorily protected activities or sympathies.

(b) Threatening employees that it will not hire, or will discharge, or will otherwise discriminate against employees who engage in union activities or other statutorily protected activities, or will shut down its operations in the event employees select a union as their bargaining agent.

(c) Discriminating against employees or employee applicants because of their union or other protected activities or sympathies, such as by conducting screening programs to ward against their hire, or by refusing to hire them, or by refusing or delaying their reinstatement after they have unconditionally offered to return from a statutorily protected strike, or by transferring them to isolated or otherwise undesirable job assignments, or by denying them work opportunities generally made available to their coworkers.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer to the employees named below full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole these employees, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this Decision.

Gregg Blackwell	Mike Russell
Dave Bonnickson	James Scott
Mike Hill	James Shepler
Kenneth Jennings	Craig Skomski
James Martin	Danny White
Matt Russell	

(c) Within 14 days of this Order, offer to the employees named below employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

(d) Make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this Decision.

Marty Aaenson	Daniel Kafton
Randy Allen	DeceVene (Pat) Kilpatrick
John Fraine	David Ray McLellan
Mike Grunwald	Jeffrey Miller
Ross Inglis	James Rush Jr.
Joseph Sumrall	Richard Duane Sage
James Thompson	Steven Carl Schmele

John Thornton	John Walsh
David Wagster	Robert Waters
Wayne Wright	Steve M. Windley
Richard Day	Perrilee Ann Miller
Dennis William Dean	Brett Michael Olson
Wilson Edwards	Dean E. Rhodes
Lars Be Hansson	Michael Wayne Survell
Robert Francis Holihan	

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the 11 employees named in paragragh (b) above and to its unlawful refusal to hire any of the 29 applicants named in paragraph (d) above, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the discrimination will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Woodinville, Washington facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1993.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER COHEN, dissenting in part.

I would not, at this juncture, order the Respondent to reinstate and pay backpay to the 29 discriminatees. My colleagues' order to this effect is premised on the conclusion that the Respondent refused to hire, not just refused to consider, the 29 discriminatees. That conclusion is not warranted. Although the General Counsel alleged a refusal to hire, the judge's decision sometimes used the phrase ''refusal to consider'' and at other times used the phrase ''refusal to hire.'' In the remedy portion of his decision, the judge said that the Respondent ''refused to hire or consider for hire'' the 29 discriminatees. Finally, in the order itself, the judge clearly treated the matter as one involving a refusal to consider. He ordered the Respondent to give ''nondiscriminatory consideration'' for hire to the 29, and to offer jobs and pay backpay to those who would have been hired but for the refusal to consider. Significantly, neither the General Counsel nor the Charging Party filed exceptions to this remedial order.

Where, as here, there is some uncertainty as to the nature of the violation (refusal to hire verses refusal to consider), the case should be remanded to the judge for clarification. At the very least, in light of the judge's remedial order (based on a refusal to consider), the Board should permit the Respondent to contend, in compliance, that one or more of the 29 employees would have been rejected for lawful reasons even if consideration had been given. In this latter regard, as noted above, the General Counsel and the Charging Party did not except to the judge's order, and thus the parties have not focused their briefs on whether this remedy was correct or not. In these circumstances, the Board should not summarily resolve the issue.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union support or activities.

WE WILL NOT threaten our employees that the Company will not hire, or will discharge, or will otherwise discriminate against employees who engage in union

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

or other statutorily protected activities, or will shut down its operations in the event employees select a union as their bargaining agent.

WE WILL NOT discriminate against our employees or employee applicants because of their union or other protected activities or sympathies, such as by conducting screening programs to ward against their hire, or by refusing to hire them, or by refusing or delaying their reinstatement after they have unconditionally offered to return from a statutorily protected strike, or by transferring them to isolated or otherwise undesirable job assignments, or by denying them work opportunities generally made available to their coworkers.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the employees named below full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole these employees for any loss of earnings and other benefits resulting from their discharges, less any interim earnings, plus interest.

Gregg Blackwell	Mike Russell
Dave Bonnickson	James Scott
Mike Hill	James Shepler
Kenneth Jennings	Craig Skomski
James Martin	Danny White
Matt Russell	

WE WILL, within 14 days from the date of the Board's Order, offer to the employees named below employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

WE WILL make them whole, for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest.

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Ross Inglis	James Rush Jr.
Joseph Sumrall	Richard Duane Sage
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Wayne Wright	Steve M. Windley
Richard Day	Perrilee Ann Miller
Dennis William Dean	Brett Michael Olson
Wilson Edwards	Dean E. Rhodes
Lars Be Hansson	Michael Wayne Survell
Robert Francis Holihan	

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of the 11 employees named above and to our refusal to hire any of the 29 applicants named above, and WE WILL within 3 days thereafter notify each of them in writing that this has been done and that the discharges and the discrimination will not be used against them in any way.

WESTPAC ELECTRIC, INC.

Patti L. Hunter and *Patrick F. Dunham, Esqs.*, for the General Counsel.

Judd H. Lees, Esq. (Williams, Kastner & Gibbs), of Bellevue, Washington, for the Respondent, WestPac.

David Hannah, Esq. (Hafer, Price, Reinhart & Robblee), of Seattle, Washington, for all Charging Parties.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. In this unfair labor prosecution the General Counsel of the National Labor Relations Board (the Board) alleges that WestPac Electric, Inc. (WestPac) violated Section 8(a)(1) and (3) of the National Labor Relations Act[1] (the Act) on scores of occasions in 1993,[2] all in reaction to an organizing campaign involving ''salting'' tactics conducted among its construction electricians by three Locals of the International Brotherhood of Electrical Workers (IBEW), Locals 46, 76, and 191 (collectively, the Unions). On December 30, the Regional Director for Region 19, acting in the name of the General Counsel, issued a consolidated complaint (complaint) and notice of hearing against WestPac.[3] I heard the cases in 17 days of trial proceedings held in Seattle, Washington, beginning on May 18, 1994, and concluding on September 16, 1994.

[1] Sec. 8(a)(1) makes it an unfair labor practice to ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' (Sec. 7 declares pertinently that ''[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]'')

Sec. 8(a)(3) in pertinent part makes it unlawful for an employer to ''discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.''

[2] All dates below are in 1993 unless I say otherwise.

[3] The complaint traced from seven unfair labor practice charges filed against WestPac between mid-August and mid-December, as follows: Local 191 Business Representative Darrell Chapman filed the first charge, on August 18, but his charge was docketed by the Region as if Chapman had filed in an individual capacity. Jim Shepler, a member of Local 191 who was salted on a WestPac job, filed the second charge on September 3, also in an individual capacity. One or more of the Unions signed the remainder of the charges, which were filed in the period September 21 through December 9.

The complaint, as amended in small ways at the trial, alleges in its independent 8(a)(1) counts that WestPac, through several named agents, unlawfully interrogated, threatened, surveilled, or otherwise coerced employees, including job applicants, on at least 18 occasions in the period mid-June through September. The 8(a)(3) counts in the complaint, as amended, allege that WestPac unlawfully discriminated against a total of 40 employees, including by ''terminating'' 11 named electricians in its employ (among whom were 8 strike participants) between July 2 and October 8, and by ''failing and refusing to hire'' 29 named electricians who submitted job applications in August and September.[4]

WestPac's answer to the complaint admits facts and conclusions which establish that the Board's jurisdiction is properly invoked,[5] and that the Unions are each ''labor organizations'' within the meaning of Section 2(6) and (7) of the Act. But WestPac denies all alleged wrongdoing, and avers several affirmative defenses to the 8(a)(3) counts, notably these two: (1) ''The alleged discriminatees sought employment with [WestPac] pursuant to the direction and/or payment of the charging party unions and therefore were not bona fide applicants or employees as defined by the Act[,]'' and (2) ''The discriminatees engaged in unprotected work stoppages as part of a campaign aimed at coercing and/or convincing others to cease doing business with [WestPac].''

WestPac's first defense deserves some priority of treatment, for it is bottomed on the claim that none of the alleged discriminatees was an ''employee'' entitled to the protections of the Act, and thus it implicates all of the 8(a)(3) counts, and most of the 8(a)(1) counts, as well. This defense collides with the Board's established interpretations of the Act's intent and reach in cases, like this one, where challenges are raised to the ''employee'' status of jobseekers or jobholders who are either ''paid union organizers'' to one degree or another, or are union members operating within the framework of their union's salting campaign. Nevertheless, the legal questions raised by this defense include ones over which the courts of appeals have split, and these questions are currently under review by the Supreme Court, pursuant to the Board's petition for a writ of certiorari, in *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted 150 LRRM 2897 (Jan. 23, 1995). I will dispose of this defense after I have narrated the background and summarized the facts most pertinent to it, and before I turn to the details of the alleged unfair labor practices.

I have studied the whole record,[6] the parties' posttrial briefs[7] and the legal authorities they invoke. Upon that study, and upon my assessments of each witness as he or she testified, I reach the following findings and conclusions, including the ultimate conclusion that WestPac committed unfair labor practices substantially as alleged in the complaint.[8]

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[4] Par. 13(f) of the December 30 complaint lists 30 names of job applicants alleged to have been unlawfully denied hire by WestPac. However, in the September 15, 1994 trial session, I granted the General Counsel's motion to amend that paragraph by deleting the name of Henry West from that list, based on West's testimony as a witness for WestPac that (a) he never seriously intended to work for WestPac when he submitted his application on September 20, but only did it for ''the lunch'' furnished by Local 46 to the 16 IBEW members who submitted applications en masse on September 20, and (b) he was in any case suffering from a physical disability that would have precluded his taking work with WestPac.

[5] Specifically, WestPac admits, and I find, as follows: WestPac, a Washington corporation, is an electrical contractor, operating from headquarters in Woodinville, Washington. All charges herein were filed in the period beginning August 18 and ending December 9, and a copy of each charge was served on WestPac on the same day it was filed. In the 12 months ending December 30, 1993, WestPac (a) realized more than $500,000 from gross sales of goods and services; (b) sold and shipped goods or provided services worth more than $50,000 from its Washington facilities to customers outside Washington, or to customers within Washington who were themselves engaged in interstate commerce by ''other than indirect means''; (c) bought and received within Washington more than $50,000 worth of goods and materials from sources outside Washington, or from suppliers within Washington who, in turn, obtained such goods and materials directly from sources outside Washington; and (d) WestPac has been at all material times an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[6] The transcript is shot through with erratic and inaccurate spellings of common words, place names, the names of key witnesses and trial personalities, and in several cases it misidentifies who was speaking during trial proceedings. In midtrial, both the General Counsel and the Respondent filed extensive motions to correct the transcripts of the May 18, 19, and 20, 1994 trial sessions (G.C. Exh. 11; R. Exh. 3), and I granted those motions during the July 5 trial session. In addition, on November 25, 1994, simultaneous with its submission of a posttrial brief, the General Counsel filed yet another extensive motion to correct the transcript of proceedings held on and after August 29. WestPac has not opposed this latter motion and I grant it.

In addition, the initially submitted transcript volumes for trial sessions held after July 8 were wrongly paginated. Thus, transcript volumes for proceedings through July 8 are appropriately numbered consecutively, and end with p. 1189; however, the transcript volume for the next session, on August 29, inexplicably begins with a page numbered ''459,'' and all succeeding pages in the transcript of the remaining sessions are numbered consecutively (more or less) from that base number, ending with a page numbered ''2079.'' (In fact, the transcript contains approximately 2789 pp.) The parties were required on brief to make citations to the original, wrongly paginated transcript. To avoid confusion, I, too will refer to the original transcript pagination in the few instances below where I judge it necessary to cite to the transcript.

I subsequently directed that the reporting service furnish new, appropriately paginated transcript volumes for the August 29 session and the ones after that, and the reporting service complied. I have transmitted to the Board both the original, wrongly paginated transcript volumes, as well as the correctly paginated substitute volumes for sessions on and after August 29. The exhibit files furnished by the reporting service were flawed in different ways: One package of exhibits which I rejected during the September 12 session (G.C. Exhs. 42(a)–(g), (consisting of seven thick volumes of dense payroll printout data) was nevertheless included in the file of received prosecution exhibits. I also rejected R. Exh. 13 as not authenticated, yet this exhibit, too, was included in the received exhibit files. I have physically labeled these exhibits as ''Rejected'' exhibits. In addition, a prosecution videotape exhibit which I received was simply not included in the exhibit files. The General Counsel has submitted another copy of this exhibit, which I shall include in the received exhibit files as G.C. Exh. 23.

[7] Counsel for the General Counsel filed a 129-page brief and counsel for WestPac filed an 85-page brief; each was filed within the deadline, which, upon the unopposed request of counsel for WestPac, was extended to November 28, 1994.

[8] I will confine my analysis of 8(a)(1) violations to those situations where the complaint alleges and the General Counsel argues on brief that such violations were committed by WestPac agents. In several other situations described below which are not targeted by the complaint, the proof may suggest that WestPac agents committed viola-

I. GENERAL BACKGROUND AND OVERVIEW

WestPac, a Washington corporation, operates an electrical contracting business from headquarters in Woodinville, a small town in King County located near the northwest outskirts of the City of Seattle, and about 25 miles from downtown Seattle. Since its formation in 1990, WestPac has performed most of its contracting work in western Washington, especially in King County and in three other nearby Washington counties which likewise touch the eastern shore of Puget Sound—Snohomish County and Skagit County to the north, and Pierce County to the south.

Steven Lilleberg, who owns 45 percent of the corporation, is WestPac's president and top operations manager. Lilleberg's[9] ownership and management experience in the electrical contracting industry dates back more than 20 years. In the late 1970s and the early 1980s he was a one-third owner and manager of a Seattle-area contracting business called ''Nolet Electric.'' Nolet was either a member of or had assigned its bargaining rights to National Electrical Contractors Association (NECA), and it was bound to successive labor agreements negotiated between a local NECA chapter and one or more of the Unions. In 1982 or 1983, however, Lilleberg and his Nolet partners arranged to ''double-breast'' the business; that is, they formed a separate, nonunion contracting operation, which they christened ''Telon Electric,'' a name created by simply inverting the letters in Nolet. In 1984, Lilleberg emerged as the president and 20-percent owner of Telon when that nonunion entity was bought by a business called Olympic Prefabricators. Lilleberg became inactive in Telon's affairs between 1988 and 1990, a period marked by a legal dispute between Nolet and Telon and their respective principals, and during which Lilleberg (and former Telon agents, Johnston and Engel, infra) became associated with an electrical firm, LedCor, based in western Canada. However, in 1990, Lilleberg formed WestPac with the backing of other investors, one of whom is Peter Johnston, a former Telon associate of Lilleberg who owns 10 percent of WestPac, and who now works for WestPac as a project superintendent. (Crediting Johnston, another 45 percent of WestPac is owned ''in blocks of 9 percent'' by various members of ''the Woodley family,'' otherwise unidentified on this record.) Another of Lilleberg's Telon associates, Larry Joseph Engel, also now works for WestPac as a project superintendent. Yet another of Lilleberg's associates from Olympic Prefabricators/Telon days, Robert Peterson (himself a part owner of Olympic Prefabricators) became a ''contract administrator'' for WestPac in February or March 1993.

This prosecution calls into question WestPac's interviewing, hiring, and firing behavior during the period from late May through the end of 1993, but its principal focus is on events in the period mid-June through mid-October, a period during which the Unions made increasingly visible efforts to organize WestPac's electricians from the bottom up. Even with the prosecution thus focused, however, the case presents a formidable variety of events and circumstances to grapple with, and many of the material facts do not admit of easy generalization. Nevertheless, certain essentially undisputed facts surrounding the alleged violations deserve to be summarized at the outset:

The Unions' 1993 attempts to organize WestPac's electricians took various forms, one of which was to try to salt WestPac's jobs with IBEW members, who would operate as an inside cadre of IBEW support during the organizing drive. Between April 1 and December 31, WestPac hired about 95 electricians for various projects, among whom were at least 9 IBEW members who had taken the jobs with the Unions' permission and encouragement and who had intentionally failed to mention their IBEW membership or experience with contractors covered by IBEW labor agreements when they applied for work. All of these 9 were hired before September 1.

As early as June 18, WestPac agents had begun to suspect, correctly, that journeyman electrician Jim Scott was one of these IBEW salts. On June 30, WestPac's attorney, Judd H. Lees, conducted a training session with WestPac's managers and supervisors on the Do's and Don't's of management behavior in the face of a union organizing drive. On July 1, one of the Unions dispatched a letter to WestPac, probably received on July 2, naming Scott and two other WestPac employees, Craig Skomski and Vincent Nash, as workers engaged on the Unions' behalf in organizing WestPac's electricians. On July 2, WestPac laid off Scott, and did not recall him for any more work after that. On August 6, it gave the same treatment to Skomski. On October 8, WestPac laid off apprentice electrician Ken Jennings from the job where he was then working; however, the parties are in dispute as to whether or not Jennings ''quit'' despite WestPac's offer of additional work. Jennings was not an IBEW member or a salt when he was hired, but in the month before his alleged October 8 termination, he had become an increasingly visible supporter of the Unions.

Between February and May, WestPac ran a help-wanted advertisement for electricians in the Seattle Times, a daily newspaper with widespread circulation in western Washington. On August 7, with knowledge of the Unions' salting campaign, WestPac placed another ad in the Seattle Times for electricians, but this one, unlike the first series, did not identify WestPac as the employer, and the telephone number listed in this second ad for replies was a toll-free, ''800'' number. On September 17, WestPac placed another anonymous help-wanted ad for electricians; however, this time the ad was published only in a Riverside, California journal, the Press-Enterprise,[10] a paper whose readership apparently con-

tions of Sec. 8(a)(1) similar to those alleged in the complaint. Any such additional violations would be cumulative and would not affect the scope or terms of my recommended order.

[9] Here and below, ''Lilleberg'' refers to Steven Lilleberg. Other members of Lilleberg's family also work for WestPac, including two of his brothers and two of his sons, one of whom is also named Steven, and who was commonly referred to in the record as ''Steve, Junior.''

[10] At p. 54 of the prosecution brief, the General Counsel observes darkly, but quite erroneously, that ''[i]t was on September 7 that Respondent's advertising for electrical workers appeared in the Riverside, California paper.'' In averring that the Riverside ad appeared on ''September 7,'' counsel for the General Counsel have not only invoked record sources which contain no support for the claim, but they have contradicted a detailed stipulation on this very point, one which they themselves authored, and which I received during the September 15, 1994 trial session, as follows:

> MR. DUNHAM: . . . We'd like to introduce General Counsel's Exhibit No. 48, which is the California advertisement.

Continued

sists mainly of residents of Riverside County, in southern California, located to the southeast of Los Angeles County. WestPac had no current or intended projects anywhere in California during this period, nor at any other relevant time.

Also in late August or early September, WestPac phased out its use of the one-page application form it had used historically in its hiring process, and began to use instead a far more detailed, six-page form. This form recited on its cover page, inter alia, that by signing the application, the applicant was ''authoriz[ing] the Company to investigate any and all statements contained in this application[,]'' and was ''consent[ing] to the Company conducting any checks on [the applicant's] background which are deemed necessary, advisable, or helpful by the Company.''

At various times in August and September, at least 29 IBEW members (including two, full-time, paid IBEW organizers, Mike Grunwald and John Walsh) applied for work with WestPac, and most of them, encouraged by the Unions to do so, openly disclosed their IBEW affiliations and their organizing intentions when they applied. The few of them who did not explicitly reveal their IBEW ties on their applications arguably did so implicitly by listing experience with IBEW contractors and by noting that they had received pay rates of $22 or more per hour on previous jobs, a wage level which WestPac managers associated with ''union scale.'' WestPac hired none of these more-or-less ''overt'' IBEW applicants, even as it hired others without such indica of IBEW affiliation.

Between August 30 and September 16, a total of eight WestPac employees participated in one or more of three brief strikes. These strikers included some IBEW salts (Jim Shepler, Mike Russell, and Jim Martin) and some who were not IBEW members when they took their jobs with WestPac (Dave Bonnickson, Gregg Blackwell, Matt Russell, Mike Hill and Danny White). Each of these strikes was followed by the strikers' unconditional offer to return to work. The first strike was economic in aimto achieve wage parity with IBEW-represented electricians working for another contractor on one of WestPac's jobsites; but the latter two are now characterized in the complaint as ''unfair labor practice strikes,'' done in protest of WestPac's allegedly discriminatory delays in reinstating the first group of strikers, its allegedly discriminatory treatment of returning strikers after it had reinstated them, and its alleged refusal to reinstate (and/or its ''termination'') of participants in the second and third strikes after they offered to return to work. Although the details are complicated, and involve a shifting cast of strikers, one net result at the conclusion of the third strike was that none of the eight strike participants was ever again called to work by WestPac, and most had been told by WestPac that they had been permanently replaced.

II. THE UNIONS' MAIN ACTORS; THEIR INITIAL APPROACHES TO LILLEBERG; THEIR ADMITTED SALTING TACTICS, AGREEMENTS AND UNDERSTANDINGS WITH CERTAIN SALTS AND WOULD-BE SALTS; LOCAL 191'S PAYMENTS TO CERTAIN SALTS AND TO CERTAIN NONSALT STRIKERS

The Unions' combined territorial jurisdictions include the East Puget Sound area of western Washington where WestPac does most of its work. At material times, Darrell Chapman was a full-time organizer and business agent for Local 191, whose headquarters are in Everett and whose jurisdiction includes Snohomish County and its northern neighbor, Skagit County. Greg Galusha and Jim Freese were full-time paid business agents for Local 46, in Seattle, whose jurisdiction includes King County. John Walsh was a full-time paid organizer employed by Local 46, and Michael Grunwald occupied a similar, paid position with Local 76, headquartered in Tacoma, Pierce County. (Both Walsh and Grunwald submitted job applications to WestPac but were not hired; they are the only full-time employees of a union alleged to have been the victims of unlawful hiring discrimination.)

The Unions, operating overall in an apparently loose confederation, tried unsuccessfully in January to persuade Lilleberg to sign prehire agreements for WestPac jobs within their respective jurisdictions. Local 191 Agent Chapman initiated these contacts in the first week of January, and met alone with Lilleberg during that week at WestPac's offices in Woodinville, Washington. Chapman, joined by Local 46 Agent Freese, met twice more with Lilleberg later in the same month. In those latter meetings the parties discussed various objections or concerns raised by Lilleberg to operating under contracts with the Unions, but they never came close to an agreement.

Chapman testified, and Lilleberg hazily admitted, that Lilleberg used religious metaphors in one or more of those January meetings to distinguish his own, ''nonunion philosophy'' (Lilleberg's expression) from that being urged by the Unions. I find, crediting the contextually plausible and specific testimony of Chapman on this point, that Lilleberg likened himself to an ''Episcopalian'' (or perhaps, as Lilleberg himself recalled it, a ''Lutheran,'' or a ''Presbyterian'') faced with proselytizing by ''Catholics,'' with Chapman playing the role of a ''Bishop'' on behalf of his ''Pope,'' i.e., the executive head of Local 191. It is apparent, moreover, that Lilleberg's use of such religious metaphors was not confined simply to his January meetings with Chapman and Freese; rather, as I shall describe elsewhere below, in several conversations with employees or employee-applicants in the months to come, Lilleberg similarly equated a prounion ''philosophy'' with a ''religion'' foreign to his own.

. . . .

ADMINISTRATIVE LAW JUDGE NELSON: This is the Riverside ad?

MR. DUNHAM: Yes.

. . . .

MR. DUNHAM: It says: ''Electrical journey/wire person; commercial/industrial; Seattle, Washington; call 1–206–486–8806.''

. . . .

MR. LEES: It is 8800.

ADMINISTRATIVE LAW JUDGE NELSON: 8800.

MR. DUNHAM: 8800. And I would ask for a stipulation that that is what the advertisement states and that it was in the Press Enterprise on Friday, September 17, 1993.

MR. LEES: I'll so stipulate.

ADMINISTRATIVE LAW JUDGE NELSON: I receive that stipulation.

Moreover, I note that September 17 was, indeed, a ''Friday,'' as the parties' stipulation correctly recites, whereas ''September 7'' fell on a Tuesday.

In the late spring, the Unions began to try to organize WestPac's electricians from the bottom up.[11] Their early tactics included encouraging some of their own out-of-work members and ''traveler''-members of other IBEW locals to apply for work at WestPac without disclosing information that might identify them as IBEW-affiliated. Thus, many IBEW member-applicants discussed below made no reference on their job applications to having worked previously for NECA member-contractors or other contractors with IBEW labor agreements, and they also made no reference to having previously received ''union-scale'' pay rates.

Local 191, through Chapman, acted as the spearhead in this early, ''covert salting''[12] phase of the organizing campaign. Between late May and the end of August, WestPac hired at least nine electricians identified by Chapman as covert IBEW salts, five of them before the end of June, the remainder before the end of August. This list of nine consists of five alleged discriminatees—*Jim Scott, Craig Skomski, Jim Shepler, Jim Martin,* and *Mike Russell*—plus four others—*Glenn DeSoto, Gerry Adamson, Vincent Nash,* and *Terry Personett*—whose respective departures from WestPac's employ in later months are not alleged to have involved any unlawful discrimination by WestPac.

After they were hired by WestPac, five of these nine signed identical, written ''salting agreements'' with Local 191. (These were alleged discriminatees Scott, Skomski, Shepler, and Martin, and nondiscriminatee DeSoto.[13]) These agreements explicitly provided, in substance, that the signers would help Local 191 in its attempts to organize WestPac's workers, and would leave the job if so directed by a Local 191 agent. In addition, from Chapman, and from many of the covert salts called as witnesses, I find that, apart from any stipulations in the salting agreements signed by five of them, the rough understanding among all of the salts and Local 191 was that, once hired by WestPac, the salts would discreetly try to enlist their fellow electricians' support for IBEW representation—or at least try to gauge their receptiveness to the idea—and would pass along to Local 191 any job-related intelligence that might assist in the organizing effort, such as job openings, the identities of new hires, their classifications, and their pay rates. In addition, some of the covert salts who did not sign salting agreements—and some of the would-be salts, as well—admittedly felt bound as IBEW members to leave any nonunion job if so directed by an IBEW business agent, and assumed they would be vulnerable to union discipline if they did not heed such a direction.[14] However, the record affirmatively shows that the salts and would-be salts were also advised by the Unions that they should be ready, willing, and able to work if WestPac offered them jobs. Moreover, the record contains no evidence that any of the Unions ever ordered any salts to abandon their jobs with WestPac, or attempted to discipline any of their members—salts or others—who sought or took jobs with WestPac.[15]

Three of these nine covert salts received wage differential payments from Local 191, that is, payments intended to make up the difference between their hourly pay on previous, ''union scale'' jobs and the hourly rate that WestPac paid them. (These were alleged discriminatees Shepler, Russell, and Martin, all of whom began working at Meyer-Burlington at various points in August, and all of whom were participants in one or more of the strikes between August 30 and September 16.) Two other covert salts received no payments of any kind. (These were alleged discriminatee Scott, who had worked at Meyer-Burlington during a 6-week period ending with his permanent layoff on July 2, and alleged discriminatee Skomski, who had worked at the Navy-Everett job, under the ''prevailing wage'' requirements of the Davis-Bacon Act, until his permanent layoff on August 6.) In addition, two nonsalt workers who participated in one or more of the strikes received payments from Local 191 characterized by Chapman as ''strike pay.'' (These were Dave Bonnickson and Danny White. Bonnickson became a member of Local 191 in early September, after WestPac hired him and after he participated in the first of the strikes at Meyer-Burlington. White was not a member of any IBEW local during his employment by WestPac.)

Even while covert IBEW salts and others with no apparent IBEW affiliation were applying and being hired by WestPac, the Unions began a new tactic in August and September, involving the referral of ''overt salts.'' Under this approach, the Unions encouraged many IBEW member-jobseekers to submit applications to WestPac in which the applicants made no bones about their IBEW membership, organizing intentions, or their experience with other IBEW contractors. By this device the Unions apparently hoped either to get more IBEW members on the job or, failing that, to get evidence that WestPac was knowingly screening out IBEW members from available work. With the obvious exceptions of full-time IBEW organizers Grunwald and Walsh, none of these would-be salts were shown to have received any payments from any of the Unions or to have been promised any such payments, although 16 of them who traveled in convoy on September 20 from the Local 46 hall in Seattle to submit job applications at WestPac's Woodinville office were treated to a beer-and-pizza lunch by Local 46 after they had completed this mission.

[11] In addition to their rank-and-file organizing efforts, agents of the Unions continued, unsuccessfully, to try to get Lilleberg to sign labor agreements on a voluntary basis, and met again with him for that purpose on a few occasions in the summer months.

[12] The General Counsel has used the expression ''covert salts'' to describe IBEW members who, with Chapman's knowledge and authorization, obtained work at WestPac without disclosing their IBEW affiliations. Although the expression may involve a certain redundancy, I adopt it as a convenient way of distinguishing WestPac workers in this class from the ''overt,'' would-be salt applicants discussed elsewhere below.

[13] Explaining why only five of the nine covert salts signed salting agreements, Chapman testified without contradiction, and I find, that these five had themselves asked Chapman for some kind of document from Local 191 to use as a ''security blanket,'' i.e., something they could produce to any union agent or steward visiting their jobsite which would verify that they had Local 191's ''permission'' to be working on WestPac's nonunion job.

[14] Acknowledgments to this general effect were made not only by covert salts Glenn DeSoto, Jim Shepler, and Mike Russell, but also by would-be salts who were never hired, including Decevene Kilpatrick, David Wagster, and Brett Olson.

[15] At least one Local 191 member, Chris (Doc) Tarter, took work with WestPac at the Meyer-Burlington jobsite without any permission from or salting understanding with Local 191. Chapman knew from his salts on that job that Tarter was working there, but Local 191 took no action against Tarter.

III. DISPOSITION OF WESTPAC'S THRESHOLD DEFENSE THAT THE ALLEGED DISCRIMINATEES WERE NOT BONA FIDE EMPLOYEES

WestPac avers as an affirmative defense that none of the (now 40) alleged discriminatees named in the complaint were ''bona fide employees'' within the contemplation or protection of the Act, because they ''sought employment . . . pursuant to the direction and/or payment of the charging party unions.'' By this defense WestPac implicitly proposes, (a) that it was free under the Act to refuse to hire anyone fitting either category (union directee or payee) for either or both of those reasons, and (b) that, having unwittingly hired some union directees or payees, it was free to fire or otherwise discriminate against them once it learned of their status as union directees or payees.

WestPac notes in support of this defense that four of the alleged discriminatees (Scott, Skomski, Shepler, and Martin) signed written salting agreements with Local 191, and that seven of them received union moneys (full-time IBEW organizers Walsh and Grunwald, who were not hired, plus the three hired salts—Shepler, Martin and Mike Russell—who received ''wage differential'' payments, plus the two other workers who received ''strike'' payments, Bonnickson and White). But WestPac urges as a more fundamental point of defense that all of the alleged discriminatees sought or obtained work with WestPac with the alleged ''understanding'' that they would leave their jobs upon the ''direction'' of the Unions or any one of them, and were for that reason alone involved in a disabling ''conflict-of-interest'' between their jobs with WestPac and their union obligations.[16] In advancing these arguments, WestPac relies centrally on the opinion of the Court of Appeals for the Eighth Circuit in *Town & Country Electric v. NLRB*, supra, an opinion which, as previously noted, is now under review by the Supreme Court.

The underlying decision of the Board in *Town & Country Electric*, 309 NLRB 1250 (1992), dealt with two classes of applicants for work with the employer, an electrical contractor. One class consisted of paid, full-time IBEW officials; the other consisted of unemployed IBEW members who operated under an IBEW salting resolution and who were promised pay differentials and travel expenses by the IBEW if they were hired and performed their expected role as salts. The Board found that the employer unlawfully discriminated against the applicants in both classes by refusing to hire them (and in one case, by firing a salt it had only recently hired) because of their IBEW associations. In so finding, the Board affirmed that all of the discriminatees were ''employees,'' and that none of their expected or actual paid relationships to the union deprived them of that status or of the Act's protections against antiunion coercion or discrimination by the employer. Id. at 1252–1258.

By contrast, in denying enforcement of the Board's order, the Eighth Circuit held in *Town & Country Electric v. NLRB*, supra, that the discriminatees in both classes were not bona fide employees within the contemplation of the Act because their respective obligations to the IBEW created an inherent conflict of interest that Congress could not have intended to countenance in the employer-employee relationship. Thus, as to the full-time, paid union agents who applied for work, the Eighth Circuit reasoned that ''when a union official applies for a position only to further the union's interests . . . an inherent conflict of interest exists,'' because ''the union official will follow the mandates of the union, not his new employer[,]'' and ''[a]dditionally a union organizer in this position has a reduced incentive to be a good employee for his second employer,'' because, if terminated, ''he simply returns to his full-time union job.'' 34 F.3d at 628. And as to the unemployed member-jobseekers, the court cited several factors supporting its ultimate judgment they, too, were subject to the union's ''control,'' and thus had interests so in conflict with their obligations as prospective employees that they, too, fell outside the Act's protections for employees. Thus, the court noted (id. at 628–629) that the union had encouraged the unemployed members to apply, and had committed to paying the difference between their salaries and union-scale wages, and that, in any case, as union members, they were subject to the union's ''job salting resolution,'' which provided that members could work for nonunion employers ''only if they work for organizational purposes,'' and that union members were to leave the nonunion job upon notification of the union. The court found that this latter factor—the member-applicants' liability under the union's salting resolution—was ''controlling'' in its judgment that they were not bona fide employees; it reasoned that such ''third party control over a putative employee's job tenure . . . is inimical to, and inconsistent with, the employer-employee relationship.'' Id. at 629.

The Board's decision in *Town & Country Electric*, supra, like its companion decision in *Sunland Construction Co.*, 309 NLRB 1224 (1992), reflects a careful reiteration, in the face of opposition in the Fourth and Sixth Circuits, of the Board's established view that jobseekers are no less statutory ''employees'' simply because they may be bent on a union organizing mission, and do not automatically forfeit their presumptive employee status and protections under the Act even if they may also be full-time, paid union officials, or union members who may expect to or do receive payments from a union relating to their organizing efforts.[17] And the Board

[16] Because I am persuaded by the Board authorities discussed below that it would not affect the analysis of any issue herein, I will not decide whether or to what extent the record would support WestPac's claim that all of the alleged discriminatees operated under some kind of ''direction'' from or ''understanding'' with the Unions that they would leave the job if so ordered by a union official. However, I note that some of the alleged discriminatees already discussed (and others incidentally noted in later findings) were not members of any IBEW local union at the time of the alleged discrimination against them, nor were those nonmembers shown to have sought or obtained work with WestPac pursuant to the ''direction'' of any of the Unions. Therefore, it would be difficult to find that such persons were—or believed themselves to be—subject to the Unions' discipline, direction, or any other form of union ''control.''

[17] In addition to the Eight Circuit's rejection of the Board's position in *Town & Country Electric*, supra, the Fourth and Sixth Circuits had previously held that ''paid union organizers'' are not 2(3) employees. *H. B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); and *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964). See also *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994), denying enforcement of certain aspects of the Board's order (310 NLRB 545 (1993), and remanding for reconsideration of remedy. However, the District of Columbia, Second, and Third Circuits have agreed with the Board that even ''paid union organizers'' (embracing both full-time, paid union agents and members who may receive pay from the union for their

has continued to affirm its *Town & Country* and *Sunland* holdings as to the presumptive employee status of paid union organizers in such cases as *AJS Electric*, 310 NLRB 121 fn. 2 (1993), *Varina Electric Co*., 311 NLRB 1347 fn. 1 (1993); *Architectural Glass & Metal*, 316 NLRB 789, 790–791 (1995); and *Corella Electric*, 317 NLRB 147 (1995). Accordingly, WestPac will not get far before the Board in claiming even that the ''paid union organizers'' herein[18] were not ''bona fide employees.''

A similar conclusion applies to WestPac's claims as to the broader class of unpaid members who were arguably working for or seeking work with WestPac at the Unions' ''direction,'' or pursuant to the Unions' salting program. Thus, it seems implicit in the Board's *Town & Country* decision that a worker's or jobseeker's mere status as a ''voluntary'' salt would not independently operate to deprive him or her of statutory employee status nor of the Act's protections.[19] Moreover, in more recent cases, that implicit holding seems to have been made nearly explicit by the Board, although there remains ground for doubt as to the precise rationale. Thus, in *Casey Electric*, 313 NLRB 774 (1994), and *AJS Electric*, supra, the Board adopted decisions by administrative law judges who had found that such participants in a salting campaign were statutory employees, and were distinguishable from ''paid union organizers.'' *Casey Electric*, supra at 786; *AJS Electric*, supra at 129. See also *Tualatin Electric*, 312 NLRB 129, 134 (1993). Indeed, in *AJS Electric*, the Board itself found that ''the employee status of Huntington, et al., was not compromised by their signing IBEW Local 441's ''Salting Resolution,'' which signing the Board characterized as an act by which Huntington, et al., had ''voluntarily obligat[ed] themselves to organize on the Union's behalf.'' 310 NLRB at 121 fn. 2. More recently, however, in *Corella Electric*, supra, the Board does not appear to have distinguished unpaid, ''voluntary oblig[ees]'' from ''paid union organizers,'' but rather, to have again implicitly equated the former with the latter for purposes of analysis. Id., citing *Sunland Construction* and *Town & Country Electric*, supra.

In short, WestPac's position that none of the alleged discriminatees enjoyed the protections of the Act extended to ''bona fide employees,'' although clearly supported as to at least some of them by the Eighth Circuit's opinion in *Town & Country Electric v. NLRB*, supra, derives its inspiration from conflict-of-interest theories that the Board has deliberately rejected after due reconsideration. And in such instances, I am not free to choose between the Board's construction of the Act and that of any court of appeals; rather, I am bound by the Board's general admonition to its administrative law judges in *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984), as follows:

> In his discussion of this issue, as elsewhere, the judge improperly relied on courts of appeals decisions instead of initially considering relevant Board decisions on the issues presented. . . . We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). It is for the Board, not the judge, to determine whether that precedent should be varied.

See also, e.g., *Architectural Glass & Metal*, supra, 316 NLRB at 790.

Accordingly, I reject WestPac's first defense, supra, insofar as it is based on the alleged status of any alleged discriminatee herein as either a ''paid union organizer'' or as an IBEW member (or nonmember) working for or seeking work with WestPac pursuant to a salting agreement or arrangement or understanding with the Unions or any one of them. And with a few, marginal exceptions, I will not revisit such defenses in my further analyses of the legality of WestPac's treatment of those employees.

IV. COMPANY HIERARCHY; ITS OPERATIONS AND HIRING IN 1993

Immediately below Lilleberg in WestPac's operational chain of command during 1993 were Project Managers Horst Coers and Alan LaRoche, who divided their time between tasks at the Woodinville office and visits to the project sites for which they were responsible. Below the project managers at material times were at least six, on-site project superintendents—*Peter Johnston, Adam Chrisman, Ralph Ridley, Theodore J. (T.J.) Nelson, Larry Joseph (Joe) Engel,* and *Patrick Fitzgerald*. In addition, WestPac's business management team included Contract Administrator *Robert Peterson*, and *Karen (Casey) Campbell*, titled ''controller,'' who also functioned as the office manager. (WestPac admits, the record shows, and I find, that all persons named in this paragraph were at all material times ''supervisors'' within the meaning of Section 2(11) of the Act, and were agents of WestPac for pertinent purposes.)

Catherine Duncan was also part of WestPac's headquarters operation; she worked as an office assistant and receptionist in the Woodinville office from early April until she resigned on September 29 and moved to Minnesota.

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organizing activities) are presumptively 2(3) ''employees.'' *Willmar Electric Service v. NLRB*, 968 F.2d 1327, 1329–1331 (D.C. Cir. 1992), cert. denied 113 S.Ct. 1252 (1993); *NLRB v. Henlopen Mfg. Co*., (dicta) 599 F.2d 26, 30 (2d Cir. 1979); and *Escada (USA), Inc. v. NLRB*, enfd. mem. 970 F.2d 898 (3d Cir. 1992).

[18] I judge that there are, at most, only five alleged discriminatees herein who would arguably qualify as ''paid union organizers'' within the meaning of the cases. These are full-time IBEW organizers Walsh and Grunwald, plus the three salts—Shepler, Mike Russell, and Martin—who received ''wage differential'' payments from Local 191. While two other workers—Bonnickson and White—received ''strike pay'' from Local 191, such payments were not shown to have been in consideration for any ''organizing'' services those employees might have performed (in fact, they were not shown to have done any such organizing), and therefore, the two strike-payees would not appear to fit the category of ''paid union organizers.''

[19] As noted previously, in *Town & Country Electric v. NLRB*, supra, the Eighth Circuit deemed the existence of the union's salting resolution a ''controlling'' factor in judging that the union-member applicants suffered from a conflict of interest that disqualified them as employees subject to the Act's protections. However, the Board had not specifically addressed the effect of the salting resolution; rather, for purposes of analysis, the *Town & Country* Board treated all the discriminatees in question as ''paid union organizers,'' and nevertheless found that they were statutory employees. 309 NLRB at 1252–1257. By thus ascribing no independent significance to the fact that the union-member jobseekers were also subject to the union's salting resolution, the *Town & Country* Board appears implicitly to have held that the salting resolution did not independently disqualify these ''paid union organizers'' as bona fide employees.

Called as a prosecution witness, Duncan's fly-on-the-wall testimony about certain in-office events variously noted below stands almost entirely uncontradicted by Lilleberg and other WestPac supervisors and managers who figured in her testimony. Moreover, while it is not critical to my ultimate findings, I will judge under Fed.R.Evid. 801(d)(2)(D), that Duncan was capable of making nonhearsay admissions on WestPac's behalf during her employ, specifically when, as part of her duties as a receptionist, she told jobseekers about the availability or nonavailability of work, or made other statements to them bearing on WestPac's current hiring needs and practices.

During the second half of 1993, WestPac performed electrical installation work on about 26 different projects in western Washington. It also had one out-of-state project in this period, a CostCo store under construction in Twin Falls, Idaho, which was completed in early August. However, we are concerned mainly with events associated with four of WestPac's larger projects located along a roughly 100-mile corridor in the East Puget Sound counties. These were, from North to South: A retail store under construction for the Fred Meyer chain in Burlington, Skagit County (Meyer-Burlington); a precipitator construction project for Texaco at a refinery in Anacortes, Skagit County (Texaco-Anacortes); a United States Navy ''Home Port'' under construction in Everett, Snohomish County (Navy-Everett); and an Eagle Hardware store under construction in Puyallup, Pierce County (Eagle-Puyallup).

Under State law and administrative regulations enforced by the Washington Department of Labor and Industries, at least 50 percent of WestPac's electricians on any of its private sector jobs in Washington had to be state-licensed journeymen (sometimes now referred to by the sex-neutral term, ''journeys''), and the rest had to be electricians registered in a qualified apprenticeship training program. This ''one-to-one ratio'' of journeys to apprentices likewise was required by WestPac's contract for the Navy-Everett job, which was also governed by the ''prevailing wage'' requirements of the Davis-Bacon Act.

From April 1 through the end of 1993, WestPac hired about 95 nonsupervisory electricians for all of its various projects; about 49 of these were classified by WestPac as ''journeymen''; most of the 46 others were identified by WestPac as ''apprentices,'' and a few were denominated by WestPac as ''trainee . . . Electrical Worker[s].'' About 55 of these hirings took place before August 1; 18 more occurred in August; 19 more in September, and 5 more in October and November.[20]

V. ALLEGED UNFAIR LABOR PRACTICES AND RELATED EVENTS

A. *DeSoto's Experiences; Interrogations and Threats by Engel in mid-June*

1. Introduction

Paragraphs 6(a) and (b) of the complaint allege in substance that on June 14, Engel unlawfully interrogated ''employees'' [sic] and threatened them with a shutdown of the business if the union came in. These counts rely on the uncontradicted testimony of covert salt Glenn DeSoto.[21] WestPac now maintains that DeSoto was a statutory supervisor, and therefore Engel's statements to him did not coerce any statutory ''employees.'' DeSoto's testimony is also directly relevant to the question of WestPac's motives in laying off covert salt Jim Scott on July 2, and serves more generally to illustrate how WestPac was handling the hiring of electricians in the early summer, and how the Unions' covert salting campaign was being conducted in this same period. With all this in mind, I think DeSoto's situation at the time of the events detailed below deserves further introduction.

DeSoto is a member of an IBEW Local in California, but in May he was in Washington seeking work as a traveler through Local 191's hiring hall, and he held a Washington license as a journeyman and as a general foreman. With Chapman's blessing, DeSoto had responded in mid-May to one of WestPac's early help-wanted ads in the Seattle Times, and was soon hired as a leadman on the early stages of the Meyer-Burlington job, after which he signed a salting agreement with Local 191. DeSoto started on that job on May 31, but quit in favor of another job on June 18. He quit mainly because he felt that Lilleberg had reneged on a promised pay raise and had been dodging DeSoto's attempts to meet with him for a pay review. In the week before he quit, DeSoto had warned both Engel and LaRoche that he would take another job if his pay complaints weren't satisfied. Separately, in his final weeks on the job, DeSoto had several times complained to Engel about the poor quality of the work being done by another journeyman (and IBEW member), Christopher (Doc) Tarter, and had urged Engel to fire Tarter. But Engel had been resisting DeSoto's recommendation because, as he explained to DeSoto, WestPac ''needed'' Tarter's journeyman ''license'' to ''stay in ratio.'' However, Engel eventually terminated Tarter on June 17, DeSoto's last day on the job.

Although DeSoto was one of five covert salts who signed a written salting agreement with Local 191 after he was hired by WestPac, on this record he does not appear to have made any distinct effort to enlist support for IBEW representation among his fellow workers. Moreover, from DeSoto's undisputed testimony about the events described next, it clearly appears that his IBEW affiliation was still quite unknown to WestPac agents when he left the job.

2. June 14–18 discussions with Engel and LaRoche

On the afternoon of June 14, Engel told DeSoto he had something he wanted to discuss, and asked DeSoto to go with him to a fast-food restaurant near the Meyer-Burlington jobsite. This was an unprecedented invitation in DeSoto's experience with Engel. Once they sat down in a booth at the restaurant, Engel began a conversation, described by DeSoto in his most deliberate version, the one I credit, as follows:

[20] These hiring data are collected from undisputed information set forth in G.C. Exh. 35.

[21] Except where noted, I rely on DeSoto's credible and uncontradicted testimony for findings throughout this subsection, including findings about his discussions with Engel and LaRoche in the period June 14–18. Although both Engel and LaRoche were called as WestPac's witnesses, they were never invited to contradict DeSoto on any material feature of his testimony.

THE WITNESS: . . . We went and grabbed some coffee and donuts and . . . we were just—first thing out of his mouth was, I hear there's union on the job. Now, this threw me for a loop. I didn't know what the heck he was talking about, because I didn't know if he meant—I didn't know if the whole job was non-union, union, what. I mean, I didn't know where he was coming from. So I said, I don't understand you. What are you trying to say? And that's why I said, what do you mean. . . . Then he goes, well, I hear there's union on the job and I need to know your position. So I was asking him again, what do you mean? I—and then I gave him the question, do you mean I'm a union member? Do you think I'm union? Am I anti-union, pro-union, whatever?

JUDGE NELSON: So you parried his question with a question?

THE WITNESS: Yes.

JUDGE NELSON: What did he say after you parried?

THE WITNESS: He just heard that there was union on the job and he wanted me to—he wanted to know what my position was. He wanted to know where I was coming from.

JUDGE NELSON: Okay. And what did you say?

THE WITNESS: I just told him I wasn't anti-union.

JUDGE NELSON: Tell me anything else you recall about that conversation.

THE WITNESS: He discussed the fact that he was union in Canada and that he didn't think the union was gonna do any good for the company, that Mr. Lill[e]berg had already told him that [if] the union came into his company, or union members, whatever, . . . he was gonna shut the job down, shut the whole shop down.

On June 17, Project Manager LaRoche came to the job and talked with DeSoto about his pay complaints. During this conversation, LaRoche, too, mentioned his suspicion of a union presence on the job. This is how DeSoto described this aspect of the conversation in a version that I credit:

THE WITNESS: Well, he [LaRoche] called me in to apologize because Mr. Lill[e]berg kept never showing up. I said, hey, I'm more than willing to go today [and] see Steve Lill[e]berg and discuss—I wanted to stay on the project. It was a good job. I liked the people I was working with other than this Doc Tart[e]r. . . . so we discussed that issue and he was apologizing because Mr. Lill[e]berg would never show up. And he was talking about that he knew there was some kind of union something going on, but he never got specific, and that's as far as he went on that issue. He never—

JUDGE NELSON: And you didn't pursue it with him?

THE WITNESS: I didn't pursue it with him, no.

JUDGE NELSON: Do you recall even how . . . the subject changed from talk about your beefs . . . to . . . the union presence[?]

THE WITNESS: He just bring it up. I don't know, maybe he was trying to yoke me or something like that. I was even wondering why he just jumped to that.

JUDGE NELSON: So your recollection is that it did come up rather disconnected from anything else . . . that was being discussed. . . . And you didn't reply when he made that reference to knowing that there was some kind of union on the job?

THE WITNESS: Yeah, I didn't reply to it.

The next morning, June 18, DeSoto returned to the jobsite and told Engel that he was quitting. During this conversation Engel again raised the subject of a union presence, and this time, Scott's name figured in Engel's remarks. I credit DeSoto when he testified pertinently as follows:

I told [Engel] my decision was that I didn't feel the company was living up to its better interest of wanting to keep people around, so I decided to leave. . . . Joe also asked me if [I] felt that Jim Scott could be the lead man on the project.

Q. What'd you tell him?

A. I told him as long as he had sufficient supervision, he could do it.

Q. Did Mr. [Engel] say anything to you about Mr. Scott's affiliation with the union?

A. No.

Q. Did he discuss with you any suspicions that he had about union members on the job?

A. Yeah. He did say he suspected he was union, but he couldn't prove it.

Q. That who was union?

A. Jim Scott.

. . . .

Q. BY MS. HUNTER: Did Mr. [Engel] say anything with regard to Mr. Tart[e]r?

A. Yeah, He [Engel] said that Doc . . . when they laid him off, he [Tarter] said, I don't know why you're getting rid of me when there's other union people on the job.

3. The 8(a)(1) analysis and conclusions

For reasons reviewed below, I conclude that DeSoto's testimony clearly supports paragraphs 6(a) and (b) of the complaint. However, I must first address WestPac's argument on brief that DeSoto was a ''supervisor'' within the meaning of Section 2(11) of the Act, and therefore Engel's questioning of and threat to DeSoto did not implicate the rights of ''employees'' under Section 7. Contrary to this claim, I find no clear or convincing evidence in this record that DeSoto, although admittedly a ''leadman'' who took instructions from Engel and passed them along to the crew, possessed or effectively exercised in his employer's interest any of the discretionary powers enumerated in Section 2(11) as betokening supervisory status. Although at one point in his testimony, DeSoto was led by the General Counsel's questioning to imply that his personal discretion came into play when selecting which workers on his crew would perform which jobs, he later expressly disavowed this implication when the issue of his possible supervisory status became the subject of more colloquy and further questioning. In addition, while it is clear that DeSoto tried to persuade Engel to terminate Tarter for incompetence, the record does not show that DeSoto's urgings played any ''effective'' role in Tarter's eventual termination. For one thing, Engel never claimed that he relied on DeSoto's dim view of Tarter when he decided to dismiss Tarter. Indeed, from DeSoto's account, I infer that Engel had been independently aware of serious problems

with Tarter's work,[22] but resisted DeSoto's urgings to fire Tarter because of an overriding concern—the need to maintain the proper ''ratio'' of journeys to apprentices on the job. Thus, Engel appears to have reserved to himself all decisions relating to Tarter's tenure on the job, including the manner and timing of his eventual termination, and it does not appear that DeSoto's complaints about Tarter had any significant effect on how Engel arrived at such decisions. Accordingly, I judge that DeSoto was a statutory employee—not a supervisor—during all material periods.

DeSoto's undenied and credited account shows that on June 14, in the restaurant booth, Engel directly demanded to know from the clearly evasive and uncomfortable DeSoto what his ''position'' was concerning the matter of ''union on the job.'' I have also found from DeSoto's account that Engel quoted Lilleberg as having said he would close the business if it became unionized. This was an unadorned and unlawful shutdown threat, for it clearly did not meet the test for any employer shutdown ''prediction'' to be found lawful—that it be ''carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.''[23] This threat alone imparted a coercive quality to Engel's related attempts to probe DeSoto's ''position'' about unions, and it is ''circumstance'' enough under *Rossmore House*[24] and *Sunnyvale Medical Clinic*[25] to establish that Engel's questioning itself was an unlawfully coercive interrogation. See, e.g., *Mathis Electric Co*., 314 NLRB 258, 263 (1994).

Accordingly, I conclude as a matter of law that WestPac committed violations of Section 8(a)(1) both when Engel asked what DeSoto's position was concerning unions and when he threatened DeSoto that Lilleberg would close the business if it became unionized.

B. *Scott's July 2 ''Layoff''*[26]

1. Introduction

Everyone agrees that, near the end of the shift on the afternoon of Friday, July 2, Engel told Scott that he was being ''laid off for a while,'' because WestPac's work would be interrupted while the walls to the Fred Meyer building were being tilted into place. Scott asked Engel if there was work for him at any other WestPac jobsites, but Engel said he didn't know, and suggested that Scott call Lilleberg on Monday. On Tuesday, July 6, following the intervening, 3-day holiday weekend, Scott did make the first of what proved to be several inquiries to WestPac agents, including Lilleberg, all of them unsuccessful. Most of the relevant surrounding details are likewise undisputed, and I will treat with them below by category.

2. Circumstances of hire

Scott was an IBEW member from a Phoenix, Arizona Local, but he had gotten his Washington journeyman's license in 1992, and he had been seeking work through Local 191's hall since then. Scott, like DeSoto and other covert salts, had been encouraged by Chapman to try to get work with WestPac without disclosing any information that might suggest his IBEW membership. In late February, Scott had submitted a resume to WestPac in which he listed several fictitious businesses in Phoenix and elsewhere in Arizona as previous employers. In March, he was called to the Woodinville office and was interviewed by Engel, who gave him some kind of ''wire-sizing test,'' and then told him that the Company was interested in hiring him for the soon-to-start job at Meyer-Burlington. However, in about mid-May, after hearing nothing further, Scott called the Company again, and learned that his original application had been lost, whereupon he asked for and soon received in the mail a one-page form, which he completed and submitted to WestPac shortly thereafter. The ''Employment History'' part of this form asked for Scott's ''last two employers,'' but Scott listed only one, a fictitious business in Phoenix.[27]

Although Scott's application was facially incomplete in that it listed only one previous employer, this does not appear to have deterred Lilleberg from hiring him. Thus, on May 21, Lilleberg summoned Scott to the Woodinville office and interviewed him personally. Crediting Scott, I find that Lilleberg asked during this interview if Scott had ''attended a union apprenticeship program,'' to which Scott replied, ''No.''[28] Lilleberg then said that WestPac was an ''open shop,'' and would hire anyone who wanted to work. After telling Scott that WestPac had a lot of jobs going or about to start, Lilleberg directed Scott to report for work at Meyer-Burlington on May 26.

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[22] In addition, based on Scott's credible and uncontradicted testimony, I find that Engel himself often directly assigned Scott to redo Tarter's unsatisfactory work.

[23] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969).

[24] 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This case teaches that mere ''casual'' questioning by a supervisor of an ''open'' union adherent about union-related matters will not by itself establish a violation of Section 8(a)1); rather, the Board announced that it would take ''all the circumstances'' into account in deciding, ''[w]hether . . . the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' 269 NLRB at 1177. It is clear enough that DeSoto was not an open union adherent when Engel questioned him, but this fact may not alone be decisive in the light of the holding in *Sunnyvale Medical Clinic*, discussed in next footnote.

[25] *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In this case, the Board more expansively applied the ''all the circumstances'' analysis prescribed in *Rossmore House*, supra, even to situations where employees being questioned are not ''open and active union supporters.''

[26] Except where noted, my findings below relating to Scott's experiences are based on Scott's credibly narrated and essentially undisputed testimony.

[27] The ''fiction'' here—as in the resume that Scott had submitted months earlier—was not in Scott's depiction of his work history and experience, but only in the name of the business he identified as his employer.

[28] Lilleberg admitted from the witness stand that he asked Scott during the interview about his apprenticeship experience, but Lilleberg denied that he used the expression ''union apprenticeship program.'' I was unimpressed here and in many other cases by Lilleberg's manner of testifying, which struck me as variously uncomfortable, coy, obtuse, or improvisatory. Moreover, the balance of his testimony about this interview incident is summary and generalized, and therefore I find it especially implausible that Lilleberg could genuinely recall that he did not use the word ''union'' when asking applicant Scott about his apprenticeship experience. I am thus persuaded here, as in other cases below, that Lilleberg's accounts and explanations were sanitized and unreliable ones.

3. Nature of the job during Scott's tenure

When Scott started on May 26, the general contractor on the Meyer-Burlington job had already cleared the site and had scraped out the ''subgrade'' depression into which the concrete for the slab floor of the building eventually would be poured, following which the preformed concrete exterior walls would be tilted up and the structure would be roofed, before any significant interior wiring could be done. Most of WestPac's work during Scott's 6 weeks on the job involved trenching and laying of underground conduit from an outside electrical source to various feeder ''chimneys'' within the subgrade space, which would be capped, then covered by the concrete floor, then re-exposed and used as further takeoffs for interior wiring once the floor had cured and the walls and roof were in place. Throughout most of that pretilt-up phase, WestPac used a crew of about 10 electricians, roughly half of whom were journeys, and the balance of whom were carried on WestPac's books as ''apprentices'' or ''trainees.''

4. Scott's IBEW activities; company knowledge

On June 18, as I have found, Engel told DeSoto that he suspected that Scott was ''union.'' As I discuss below, this fact is enough to establish that WestPac had the requisite knowledge of Scott's IBEW status before it laid him off on July 2. However, the record also suggests that, until the day before he was terminated, Scott, like DeSoto, did not engage in any distinct organizing efforts among the other WestPac electricians on the Meyer-Burlington job. This reasonably invites the question, How could Engel have formed his June 18 suspicion of Scott's IBEW role where Scott did not become an overt IBEW campaigner until his last 2 days on the job? The record does not supply a certain answer; it only suggests a number of possible vectors of transmission of this information, as follows:

During most of Scott's tenure on the job, his union activities were limited to making periodic reports to Local 191's Chapman about such things as the identities of those fellow workers, recent hirings, and ongoing problems that WestPac was experiencing in trying to maintain the one-to-one ratio of journeys to apprentices on that job. Unlike DeSoto, however, Scott told at least three other workers that he was an IBEW member; these were DeSoto, known to Scott as a fellow salt, Rory Richardson, a nonmember classified by WestPac as a ''trainee,'' and with whom Scott regularly commuted to and from the job, and Greg Blackwell, classified as an ''apprentice,'' whose union membership status at the time is unclear.[29] Also, on an uncertain date in mid-June, when some union represented equipment operators working for another contractor on the site had made cracks to WestPac workers about being ''rats'' (i.e., working nonunion), Scott had replied, ''Not all of us are rats[,]'' and had then rolled up his shirtsleeve, revealing a distinctive, multicolored tattoo of the IBEW logo on his upper forearm. In addition, Scott knew from contacts with Doc Tarter at the Local 191 hiring hall that Tarter was an IBEW member, and presumably, Tarter likewise knew of Scott's IBEW affiliation. Finally, in the last week of June, a recently hired journeyman, Steve Ferris (who was apparently brought on the job to replace Tarter, and thus to re-establish the necessary journey-apprentice ratio), told Scott that Engel knew that Scott was an ''IBEW salt.'' While this hearsay cannot independently establish that Engel had such knowledge, it at least shows that new-hire journeyman Ferris had somehow become aware of Scott's role as a salt by late June, and thus this evidence implies that Scott's pro-IBEW status had become common knowledge on the jobsite by late June.

A few days after Ferris told Scott that Engel knew Scott was a salt, Scott told Local 191's Chapman about Ferris' disclosure. (By this point, too, DeSoto had separately advised Chapman that Engel suspected that Scott was ''union.'') Acknowledging that Scott's cover had apparently been blown, Chapman told Scott that he might as well reveal his union sympathies openly. Thus it was that when Scott came to work on the morning of July 1, he wore a short-sleeve shirt for the first time, exposing his IBEW tattoo, and he also put a number of ''union bugs'' (IBEW logo-stickers) on his hard hat, and began to openly discuss his union membership and to extol its advantages to other workers. However, Scott acknowledged that Engel was absent from the jobsite on July 1, and there is no direct evidence that any agent of WestPac learned of Scott's July 1 and July 2 coming-out displays of IBEW support before Engel laid him off on the afternoon of July 2.

It is apparent from DeSoto's revelations, supra, that WestPac agents Engel and LaRoche believed as early as mid-June that there was a ''union'' presence on the Meyer-Burlington job, and that Engel had by then focused on Scott as a prime suspect in this regard. And in all the circumstances, I deem it probable that Engel would have shared with LaRoche and Lilleberg his suspicions concerning Scott's pro-IBEW status, and that he would have done so by no later than the point on June 18 when Engel confided those same thoughts to DeSoto.

It is further apparent that WestPac's suspicions about union organizing on the job had somehow ripened into rather clear knowledge of the same by no later than June 30; for it was on June 30 that WestPac's attorney, Judd Lees, met with all company managers and supervisors and instructed them in the ''Do's and Don't's'' of management conduct in the face of a union organizing drive. However, despite WestPac's unsupported attempt on brief to explain this timing,[30] WestPac's witnesses never acknowledged even suspecting the existence of union organizing activities as early as June 30, much less did any of them identify what it was that had triggered Lees' appearance and counseling on June 30. And this failure to explain—and offering of spurious explanations on brief—is itself suspicious in the circumstances, for it suggests a wish by WestPac to conceal or obscure not

[29] The parties stipulated (G.C. Exh. 29, item 3) that Blackwell would testify, inter alia, that ''[a]t the time of his hire, he was not a member of the IBEW, nor was he sent to WestPac Electric as a 'salt' by the IBEW.'' While the record shows that Blackwell later participated in the August 30–September 16 strikes at Meyer-Burlington, the record is silent as to Blackwell's connection, if any, with any of the Unions at the time Scott disclosed to Blackwell that he was an IBEW member.

[30] WestPac avers on brief (p. 11) that Lees' June 30 ''Do's and Don't's'' meeting was ''[b]ased upon job site visitations by union business agents.'' However, the portions of the record it cites in support of this averral do not, in fact, support it. Nor can I detect any evidence elsewhere in the record that might support this averral. Indeed, I can discover no evidence even that IBEW agents had conducted any ''jobsite visitations'' prior to June 30.

just how much it knew about the Unions' organizing efforts at an early stage, but when and from what source or sources it had gained such knowledge. Therefore, absent any other proof by WestPac as to how it had confirmed by June 30 its mid-June suspicions about a ''union'' presence on the job, I infer that by June 30 it had gained such confirmation by means that would have proved embarrassing to WestPac's litigation position herein if it had revealed them. And I further infer from these circumstances that if WestPac had been candid about the sources of its intelligence, this candor would have revealed that, by June 30, WestPac had also confirmed its mid-June suspicions about Scott's likely role as a ''union'' salt.

Third, WestPac admittedly received a letter that was mailed on Thursday, July 1, from a Local 46 agent in Seattle, in which Scott and Skomski (and a third hitherto covert salt, Vincent Nash) were identified as ''IBEW members . . . involved in a concerted effort to organize WestPac . . . according to National Labor Relations Act Rules.''[31] Although the record does not show exactly when WestPac received that letter at its Woodinville office,[32] I infer from the letter's July 1 Seattle postmark and the close proximity of Seattle to Woodinville that WestPac received the July 1 letter in due course of the mails on Friday, July 2,[33] apparently before Scott was ''laid off'' later that day.

5. Duncan's testimony about Lilleberg's reaction to the July 1 letter

As I have previously noted, Catherine Duncan worked from early April to late September as an office assistant and receptionist in WestPac's Woodinville office, and her accounts of certain in-office events are not contradicted in any material way by Lilleberg and others who figured in those events. Duncan's departure from WestPac's employ appears to have been amicable. Although Duncan showed some tendency to express herself in terms of generalization or characterization, and her memory of the timing of some events was plainly hazy, she delivered her testimony in a credible manner, and she had no apparent reason to fabricate or embellish. For all of those reasons, I will rely on Duncan's testimony for the following findings, and for certain other findings set forth elsewhere below:

When the July 1 letter from Local 46 arrived at the Woodinville office, Lilleberg talked about it with Campbell and Peterson in Duncan's presence. He referred to ''two people'' named in the letter as ''union organizers'' on WestPac's jobs. (Duncan specifically recalled that Lilleberg named ''Skomski'' as one of the ''journeymen'' named in the letter, but Duncan could not recall the second name mentioned by Lilleberg.[34]) Concerning this same transaction, Duncan also testified, and I find, as follows:

> Q. BY MS. HUNTER: What did you hear him [Lilleberg] say?
>
> A. He wanted to get rid of the people who were in the union. He realized that he couldn't do that all at once, as it's against the law. So he had to do it in a way that would be less suspicious, less noticeable.
>
> Q. Did he say what he would do?
>
> A. Lay them off slowly, gradually, not all at once. He would get rid of the journeymen first; they seemed to have more influence or could be officers.
>
> Q. And then?
>
> A. Like Craig Skomski was an officer.
>
> Q. And then?
>
> A. And then he wouldn't hire union.

6. Scott's postlayoff efforts to regain work with WestPac

On July 6, Scott called the Woodinville office for Lilleberg, but was referred to Campbell, who told Scott that Lilleberg was still on vacation and wouldn't return until July 13. Scott reached Lilleberg when he called again on July 13; Lilleberg said in this conversation that he ''didn't have anything for [Scott] right then,'' but that WestPac had Scott ''listed as available for work.'' However, he also told Scott that he should feel free to ''pursue other employment if [he]

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[31] Nash was fired for alleged incompetence either shortly before or shortly after WestPac received the July 1 letter.[*] Nash's discharge, like Scott's, was the subject of a charge under Sec. 8(a)(1) and (3) filed against WestPac by Local 191, through Chapman, on September 2, in Case 19–CA–22957. However, the charge that Nash was unlawfully discharged was apparently withdrawn or dismissed by the regional office, for Nash's discharge is not alleged in the complaint to have been unlawful, even though Scott's discharge is so alleged.

[*] According to information compiled in summary form in G.C. Exh. 41, Nash, a journeyman, worked for WestPac at a project for Heath-Techna Aerospace from June 24 to an uncertain point in the payroll period ending Sunday, July 4. And his superintendent on that job, T. J. Nelson, testified that he removed Nash from that job and ''sent him back to the office'' because he was ''incompetent.''

[32] Throughout the General Counsel's brief, the prosecution simply equates the letter's date of mailing with the date of its receipt. (See, e.g., p. 33, where briefing counsel aver that ''Respondent learned of the commencement of the overt organizing campaign on July 1.'') In fact, however, the date of receipt was never established with precision.

[33] I note further in this regard that all but one of return receipts attached to the various charge-notice letters to WestPac indicate that those letters were received by WestPac on the day after the stamped certificate of service on each letter shows that they were placed in the mail by the Regional Office from its downtown Seattle location. See G.C. Exhs. 1(b), (d), (f), (h) (j), and (l). The only exception involves G.C. Exh. 1(n), whose certificate of service reflects a mailing on (Friday) December 10, and whose return receipt shows receipt by WestPac on (Monday) December 13.

[34] I am not persuaded by counsel for the General Counsel's reasoning (Br. 90, fn. 224) in which the prosecutors argue that the ''other union member mentioned by Lilleberg was Jim Scott.'' The argument is linked to the fact, noted supra, that Nash was ''terminated'' for incompetence'' at a nearby point. The inference sought to be established—that ''Jim Scott'' was the ''other'' name mentioned by Lilleberg to Duncan—might be a plausible one if the record showed that Nash had already been fired when WestPac received the July 1 letter, but inasmuch as the General Counsel acknowledges in the same footnote that Nash may not have been terminated until ''shortly after the July 1 letter,'' the inference urged by the prosecution is hopelessly speculative.According to information compiled in summary form in G.C. Exh. 41, Nash, a journeyman, worked for WestPac for about 2 weeks at a project for Heath-Techna Aerospace, i.e., from June 24 to an uncertain point in the payroll period ending Sunday, July 4. And his superintendent on that job, T. J. Nelson, said that he removed Nash from that job and ''sent him back to the office'' because he was ''incompetent.'' However, apart from his name having been mentioned in the Union's July 1 letter, Nash's experiences do not figure further in the case, for his discharge was not alleged to be unlawful.

had to.'' In mid-August, Scott saw an ad in the paper from an unnamed party seeking electricians; the ad had only an ''800'' telephone number on it, but it was admittedly placed by WestPac.[35] On August 17, Scott called that number and spoke with a female ''secretary,'' who I presume was Duncan. She told him that the job or jobs had already been ''filled.'' He asked why he hadn't been called; she explained that the company had filled the job or jobs from ''inside,'' even though the office had received a lot of responses to the ad. Scott called again in mid-September, and was put on hold at length by the receptionist (again, I presume that this was Duncan), who came on the line periodically to say that Lilleberg was still in a meeting. Scott eventually abandoned the call when the receptionist told him that Lilleberg would call him back; however, Lilleberg never did so.

7. What happened to other Meyer-Burlington crewmembers during the same period?

Engel admits that roughly four electricians were retained at the Meyer-Burlington job even during the tilt-up phase, most notably, journeyman Ferris, who had only come to the job on June 28, with no prior work history for WestPac.[36] Moreover, although Engel at one point testified that he ''laid off'' 4–5 workers from the 9–10 person crew at Meyer-Burlington when the tilt-up phase was reached, he apparently meant by this only that he reduced the size of the crew at that particular jobsite, for he either admitted or the record otherwise shows that two of the electricians thus ''laid off'' (apprentice Greg Blackwell and trainee Rory Richardson) were simply reassigned to other WestPac jobs during the tilt-up phase, and lost little or no work as a consequence.[37] Indeed, as far as I can tell from this record, Scott was the only electrician (journeyman, apprentice, or trainee) on that job as of July 2 who was permanently laid off.[38] Moreover, by ''late July or early August,'' as Engel admits, the foundation pour and tilt-up of the walls was done, and WestPac by then had brought back 9–10 electricians for the substantial amount of inside wiring that remained. Indeed, as Engel acknowledges, the inside wiring crew consisted of 14 electricians as of August 30, having been gradually augmented in preceding weeks by a number of new hires (which number included more covert salts, infra), as WestPac struggled to complete the job before the store's scheduled opening in the first week of October.

8. Analysis and conclusions as to Scott's termination

In *Wright Line*,[39] the Board announced that it would,

> henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[40]

Previous findings adequately reveal—and subsequent findings merely amplify these points—that Lilleberg was fundamentally hostile to the idea of a unionized WestPac workforce, and that once he received the July 1 letter disclosing that Scott and Skomski (and Nash) were engaged in organizing for the IBEW, he announced his intention to ''lay off'' the organizers identified in that letter (and other likely pro-IBEW suspects—especially journeymen) from current jobs, and to ''not hire union'' in the future. Previous findings likewise reveal that WestPac agents knew or believed that Scott was a pro-IBEW worker before Scott was separated from his job on July 2.

These facts alone suffice to make a prima facie showing that Scott's IBEW membership and organizing intentions and activities were ''motivating factors'' in the ''decisions'' to separate Scott from employment on July 2, and to rule him out for recall for further WestPac work thereafter.[41] Other facts noted above merely tend to reinforce this prima facie showing, and are pertinent only insofar as they effectively foreclosed WestPac from claiming that it had no other work for Scott when it laid him off.[42] Accordingly, I judge that

[35] On August 7, as the parties stipulated, the Seattle Times ran a want-ad placed by WestPac which stated, ''Electrical. Journey level and apprentices for work in Western Washington. Call 1–800–553–9722.''

[36] Engel specifically admits, the record otherwise shows, and I find, that, besides retaining Ferris at Meyer-Burlington during the tilt-up phase, WestPac also retained journeyman John Hollinger (who was first hired by WestPac in August 1990 and then worked for an uncertain period, then was ''rehired'' on June 25, only a week before Scott's layoff and the beginning of the tilt-up phase), and also retained ''trainee'' Mike Powell (hired May 23, and brought to Meyer-Burlington in the week ending June 20).

[37] Engel acknowledges, the record shows, and I find, that apprentice Gregg Blackwell (hired March 24) stayed on the Meyer-Burlington job for about a week after Scott's layoff, then was reassigned for the following 2 weeks to work on the Twin Falls, Idaho CostCo store and a Home Depot project in Seattle, then was returned to the Meyer-Burlington job on August 1. The record also shows that ''trainee'' Rory Richardson (hired May 24) was laid off for only a week after Scott's layoff, then was continuously employed, mostly at a Home Depot project in Tukwila, Pierce County, through the end of August.

[38] A ''laborer'' on that crew, Ron Ramos, whose function had been limited to digging conduit trenches before the pour and tilt-up, was likewise permanently laid off in the same week, but Engel and Lilleberg acknowledged that Ramos had been hired for only that digging work.

[39] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[40] 251 NLRB at 1089. See also *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), affirming this analytical approach and burden-shifting scheme.

[41] Strikingly, it is nearly impossible to determine from the testimony of either Engel or Lilleberg exactly who was responsible for the ''decision'' to select Scott for (permanent) ''layoff.'' In the absence of any clear or convincing testimony on this point, I infer that the decisions to (a) select Scott for layoff, (b) not to ''shuffle'' him to another job, and (c) not to recall him for later available work at Meyer-Burlington or elsewhere, were all made by Lilleberg himself, who admittedly had the ultimate say on all such questions.

[42] I have found that WestPac treated Scott differently from other electricians on the Meyer-Burlington job in that the others were either retained on that job during the tilt-up phase or were given other work during that interruptive phase. While this evidence, too, arguably may have a tendency to support a prima facie case of unlawful

Continued

it became WestPac's burden to ''demonstrate'' that it would have terminated Scott's employment on July 2 even absent his IBEW membership and organizing intentions. And in this regard, I note that WestPac's burden is a heavy one: For example, in *Delta Gas, Inc*., 282 NLRB 1315 (1987), the Board said [id. at 1317; my emphasis; footnote cites. omitted]:

> An employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for the action, but must show by a *preponderance of the evidence that the action would have been taken in the absence of protected conduct*. A judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found.

I have disposed of WestPac's threshold affirmative defense that Scott was not a bona fide employee by virtue of his salting agreement or understandings with Local 191. But WestPac further argues in a related vein (Br. 35) that, apart from his salting understanding with Local 191, Scott was one of several salts who supposedly ''openly admitted that they engaged in union organizing activity on work time.'' (Again, Scott's supposed admission is invoked by WestPac on brief as evidence that ''work-time organizing'' was part of the package of ''directions'' from Local 191 that Scott was bound to, and that such alleged directions constitute additional reasons for finding that Scott was never a ''bona fide employee.'') WestPac's argument depends at bottom on a claim of fact that is simply unsupported by the record WestPac purports to rely on. Indeed, in claiming that Scott and others ''openly admitted that they engaged in union organizing activity on work time,'' WestPac has significantly distorted their testimony.[43] Beyond that, no WestPac agent has tried to suggest that Scott's termination was grounded in the Company's honest belief that he was engaging in unprotected forms of organizing activity.[44] Accordingly, where the claim that Scott ''openly admitted'' to worktime organizing activity lacks record support, and WestPac has never sought to prove in any case that it was moved to fire Scott for supposedly unprotected organizing behavior in the course of his employment, I dismiss this argument as merely a desperate contrivance.

WestPac's attempts to meet its *Wright Line* burden are marked by similar appearances of contrivance. From Lilleberg's and Engel's discursive and inconclusive accounts, it appears that WestPac would explain the need for Scott's ''layoff'' at Meyer-Burlington in early July in terms of the necessary interruption of work during the tilt-up phase. Obviously, however, even if I accept that the tilt-up interruption might present a legitimate reason for temporarily reducing the work crew at Meyer-Burlington, the arguable need for a temporary reduction hardly explains why Scott—rather than, say, the more recently hired journeyman, Ferris—was the one selected to be thus ''laid off.'' (Significantly, Lilleberg testified that his normal practice in crew-reduction situations was to retain the most senior workers.) Much less does it explain why Scott was not ''shuffled'' to other available work (WestPac's more typical practice, as Lilleberg admitted, and a practice that appears to have been followed when it came to the ''layoff'' of other Meyer-Burlington electricians during the tilt-up interruption). Still less does this explanation account for WestPac's failure to invite Scott back to the Meyer-Burlington site 3 weeks later, when the crew was again beefed-up for the interior wiring phase. Much less does the presumed need to temporarily reduce the crew during the tilt-up phase explain why, despite Scott's repeated efforts to regain work with WestPac in the following months, WestPac bypassed him for available work in favor of ''inside'' personnel or new applicants.

In the end, as far as I can discern, WestPac's answers to all of these questions are commonly grounded in a single assertion—that Scott's work while at Meyer-Burlington was ''pretty, but slow.'' Thus, Engel testified that he had once so advised Lilleberg, and Lilleberg testified likewise. (Scott, however, testified credibly and without contradiction that Engel never made any critical remarks to him about any feature of his work.) But neither Engel nor Lilleberg offered any coherent account of either the timing or the context in which Engel supposedly delivered himself of this appraisal to Lilleberg. Neither was Engel willing to testify, although invited to do so, that he had actually ''recommended'' to Lilleberg that Scott be laid off, and not recalled in the future, because of his supposedly pretty-but-slow work. (On this point, the most that Engel would say—and then with obvious discomfort—is that he ''might have'' made some such recommendation to Lilleberg.) I also recall from DeSoto's credited account that, during DeSoto's conversation with Engel on June 18, Engel brought up Scott as a possible candidate to replace DeSoto as the crew's leadman—an unlikely idea for a superintendent to entertain if he genuinely believed that the candidate was an unacceptable performer. Thus, if Engel ever believed and/or told Lilleberg that Scott's work was

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discrimination against Scott, I prefer to consider such evidence of disparate treatment as significant only insofar as it tends to rebut or forestall any defense urged by WestPac which is grounded in a claim that Scott's services were no longer needed by WestPac once the tilt-up phase began at Meyer-Burlington. (And as I further note below, WestPac has nowhere tried to claim that it no longer needed journeymen after July 2; rather, its *Wright Line* defense to the termination of Scott focuses on Scott's supposed inadequacies as a worker.) Put another way, I think the burden under *Wright Line* shifted to WestPac without reference to such proof of disparate treatment, but was triggered simply by the General Counsel's showing that in a general atmosphere of antiunion animus, Scott was laid off only shortly after WestPac agents began to suspect that Scott was a ''union'' presence on the Meyer-Burlington job.

[43] WestPac cites Scott's testimony at vol. XI, 783:10–11 as a supposed ''open admission'' that Scott conducted ''organizing activity'' during ''work hours.'' In fact, in that passage, and in those immediately preceding, Scott was referring to his ''information-gathering'' role for Local 191, which he described as involving ''mainly just keeping my ears open, really[,] listening to conversations.'' And in that context, he agreed that he had done such ''listening'' not only during ''break time . . . lunch time. Before work you know[,]'' but also ''during work hours.''

[44] Cf. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *Keco Industries*, 306 NLRB 15, 17 (1992); *Ideal Dyeing & Finishing Co*., 300 NLRB 303 (1990); and *Wilshire Foam Products*, 282 NLRB 1137, 1157–1158 (1987).

''pretty, but slow,'' it appears that Engel never intended this as an especially damning appraisal of Scott. Finally, given Lilleberg's admission elsewhere that he would not normally lay off or fire a worker who was out of favor with a single supervisor, but rather, would merely reassign the disfavored worker to a different project, it is nearly impossible to believe that Engel's pretty-but-slow appraisal of Scott could independently account for Scott's termination.

Lilleberg, although appearing overall to be saying that the pretty-but-slow appraisal of Scott was why Scott lost his job on July 2 and was never recalled after that, nevertheless clouded the defense picture by suggesting another reason for removing Scott from employment—that he had never really intended to use Scott permanently at Meyer-Burlington, but had hired him with a different job in mind, one that was being planned in late May, but one that was later abandoned, thus leaving Scott without the job that Lilleberg had originally intended him to perform. Lilleberg advanced this explanation with such casual glibness that I might reject it on demeanor grounds alone as mere improvisation. This explanation was in any case so implausible and inconsistent with other admissions Lilleberg made that I am doubly dubious. Thus, Lilleberg generally admitted, in substance, that WestPac did not normally hire electricians with only a single job in mind, or terminate them when the job they were first assigned to was interrupted or completed. Rather, as Lilleberg generally explained, he preferred, having invested in the training of electricians to WestPac's way of doing things, to retain them as ''known quantities,'' and to keep them employed even if their current work ended or was interrupted, and even if they might not be in favor with a single superintendent. In such cases, as Lilleberg admitted, he would ''shuffle'' them to other jobs where at all possible. Moreover, Lilleberg's claim that he hired Scott only with the subjective intention of using Scott for a project that never began is inconsistent with Scott's credited and uncontradicted accounts of what both Engel and Lilleberg said to him during prehire interviews—in substance, that WestPac's intent was to use Scott at the Meyer-Burlington job. Finally, Lilleberg unconsciously contradicted himself on the this latter ''reason'' when he also testified at one point that, after Scott's layoff, he still envisioned recalling Scott to Meyer-Burlington as soon as the tilt-up interruption was completed.

WestPac's *Wright Line* burden was to demonstrate by a preponderance of the credible evidence that it would have terminated Scott's employment on July 2 even absent his IBEW membership and organizing intentions or activities. WestPac's attempts to meet this burden suffered overall from simple implausibility in the light of the known circumstances, and raised more questions than they answered. Therefore, I judge that WestPac has failed to ''refute the General Counsel's prima facie case'' (*Delta Gas*, supra), and I conclude as a matter of law that WestPac violated Section 8(a)(3), and derivatively, Section 8(a)(1), when it terminated Scott's employment permanently on July 2.

C. *Lilleberg's July 22 Statements to Personett*

1. Facts

Paragraph 10(f) of the complaint alleges that ''[o]n or about July 22, 1993, [Lilleberg, at Woodinville] threatened and coerced an employee by informing him that [WestPac] would not place more than a limited number of employees who are engaging in Union activities on any one job site.'' Based on the credible and not clearly controverted account of covert salt Terry Personett,[45] I find as follows: Lilleberg had personally interviewed and hired Personett for the Eagle-Puyallup job, where Personett had started working on July 21.[46] On July 22, however, Personett had been called to the Woodinville office to complete various forms related to his recent hiring. While there, he overheard a conversation between Lilleberg and a ''blond man'' whom Personnel did not know. (For reasons noted in due course, I find that the blond man was Project Manager Coers.) The blond man was complaining to Lilleberg about one of his employees on a ''job up north'' who was ''doing a lot of union talk to the employees.'' Lilleberg cautioned the blond man that the employee could not be prevented from ''using his freedom of speech.''[47] Lilleberg soon came over to Personett and explained that WestPac ''had union people working at their shop,'' and that WestPac ''made sure that they took only two or three on any one job[,] because of the problems that the conversation would create.'' (Lilleberg declared a similar intention, but offered what I find was a more candid explanation for it, to office employee Duncan in a nearby period.[48]) Lilleberg also encouraged Personett to bring in any fellow workers from his former job who might want work with WestPac, and Personett later did so. (See findings, infra, relating to the experiences of Ken Jennings and Gary Falvey, two workers who applied for jobs with WestPac at Personett's suggestion and who were hired.)

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[45] Lilleberg, responding to generalized questioning from his attorney, claimed not to ''recall'' any events such as those described below by Personett. I give no weight to these faint denials.

[46] Personett was a member of Seattle Local 46 and of that Local's Executive Board, but he had not disclosed his union membership or work with IBEW contractors when he was interviewed and hired by Lilleberg.

[47] Relatedly, office assistant, Duncan, credibly testified, and I find, as follows: At an uncertain point in this approximate period, Duncan overheard two telephone conversations between Lilleberg and attorney Lees. (Lilleberg was using a speakerphone mode in both conversations, and Duncan was thus able to overhear both sides of the conversations.) In the first conversation, Lilleberg sought advice from Lees about whether he might ''limit'' union-related conversations to locations outside the ''perimeter'' fence of his projects; during the second, Lees counseled that Lilleberg could not ''stop all conversations,'' and that workers were ''free'' to say what they wanted to during lunch and work breaks, but that WestPac could limit those conversations to times outside ''work hours.'' I infer that Lilleberg's reply to the ''blond man'' (Coers) in the conversation witnessed by Personett was informed by such advice from his attorney.

[48] Crediting Duncan's uncontradicted testimony, I find as follows: In ''late July, possibly earlier[,]'' Duncan overheard Lilleberg talking with Peterson in the Woodinville office. He told Peterson that he ''wanted to separate—to transfer workers to separate the union workers to decrease the numbers on each job.'' A few days later, Duncan queried Lilleberg about his ''concern for a majority of members, union members, on a job.'' He replied that ''the way it works is a non-union shop can have a job which is union, if the men working on the job vote to go union; then you'd have one union job or more, depending on the votes. So if the union felt that they could get a majority vote, they would take a vote. Therefore, he was going to transfer them and always keep their numbers below a majority.''

In the light of all the known circumstances, including several discussed in the next section, I find that the blond man was Project Superintendent Coers, that the ''job up north'' he was referring to was the Navy-Everett job, and that the employee that he complained was ''doing a lot of union talk'' was Craig Skomski.

2. The 8(a)(1) analysis and conclusion

Lilleberg's remarks to Personett on July 22 about limiting the number of union members on any given job would have a strong tendency to discourage Personett or any other employee listener from joining a union, or maintaining union membership, or engaging in union activities, because such remarks would cause the employee to fear that if any such prounion status or behavior became known to WestPac, this could adversely affect the employee's job opportunities or project assignments. Therefore, I conclude as a matter of law that when Lilleberg said this to Personett, WestPac violated Section 8(a)(1) of the Act, substantially as alleged in complaint paragraph 10(f).

D. *Skomski's August 6 ''Layoff''*[49]

1. Hiring; work history

Sometime before June 1, covert salt Skomski, a member of IBEW Local 441 in Santa Ana, California, and who held a Washington journeyman's license, called WestPac's offices and inquired about work. He soon received by mail a one-page application form, which he completed and mailed back to WestPac on June 1. His application mentioned no employment with IBEW contractors. On Saturday, June 10, Lilleberg interviewed Skomski at the Woodinville office and told him that he was hired and would start on Monday, June 12, at the Navy-Everett job, where he would spend ''about a week,'' following which Skomski might be sent to other pending WestPac projects. (In this latter regard, Lilleberg told Skomski that WestPac was ''bidding a lot of work,'' and large jobs at that, i.e., only ''$500,000-plus'' jobs.) Skomski started at Navy-Everett on June 12, as scheduled, working under Project Superintendent Fitzgerald and Fitzgerald's superior, Project Manager Coers.

Despite Lilleberg's suggestion during the interview that Skomski might stay only a week at Navy-Everett, Skomski remained continuously employed on that project for nearly 2 more months, until Friday, August 6. As I more fully describe below, it was on the morning of that day that Lilleberg and Campbell were subjected to a lengthy payroll review session with a Navy contract compliance representative who, spurred by Skomski's and Local 191's complaints, was investigating apparent violations by WestPac of ''ratio'' requirements and related Davis-Bacon pay violations. And it was on the afternoon of that day that Fitzgerald, acting on Coers' instruction (who admittedly was, in turn, acting on Lilleberg's instruction), told Skomski that he would have to be laid off ''to make room for a long-term employee.''

[49] Unless otherwise noted, my findings in this section derive from Skomski's credible and essentially undisputed testimony, most of which is echoed in material part by various other persons mentioned below.

2. Skomski's union activities; company knowledge and reactions

Lilleberg learned from the July 1 letter from Local 46 that Skomski would be aiding the Unions' organizing effort, and Lilleberg vowed in Duncan's presence to get rid of Skomski and other likely prounion journeymen, but only ''gradually,'' and ''in a way that would be less suspicious, less noticeable.'' Despite the announcement of Skomski's organizing role in the July 1 letter, Skomski did not actually distinguish himself as a union organizer until on or about July 12, after he had been on the job for about 5 weeks. Thus, on and after July 12, Skomski began to wear prounion paraphernalia and to ''talk-up'' the idea of IBEW representation among his fellow employees. One of these was Skomski's occasional work partner, Steve Lilleberg Jr. (Lilleberg's son, referred to below as ''Steve Jr.'') On July 22, during one such discussion while they were working together, Steve Jr. replied to Skomski's enthusiasm for the IBEW by declaring (echoing Engel's June 14 threat to DeSoto) that WestPac would never sign a union contract, but would shut down first. Crediting Fitzgerald, I find that Steve Jr. came to Fitzgerald later the same day to ''complain'' about Skomski's proselytizing. Crediting Skomski and Fitzgerald, I find that Fitzgerald called Skomski into the trailer office still later the same day. Crediting Skomski, I find that Fitzgerald told Skomski to ''knock off,'' or ''cool it on [his] union rap,'' and to ''stop spreading the Gospel.''[50]

Project Manager Coers admittedly learned from Fitzgerald himself about the latter's lecture to Skomski, and Coers admittedly passed this information to Lilleberg, although Coers was vague about the circumstances and timing. I find that Coers had at least one such conversation about Skomski with Lilleberg on the same day, July 22, that Fitzgerald lectured Skomski about ''spreading the Gospel.'' Thus, as I have found above, Personett overheard an office conversation on July 22 between a ''blond man'' and Lilleberg during which the ''blond man'' complained about an employee ''up north'' who was ''doing a lot of union talk.'' Considering the timing of the overheard conversation, and its content, and Personett's description of the ''blond man,'' I have no significant doubt that Coers was the ''blond man,'' and that Skomski was the subject of their conversation.

3. Skomski's whistleblowing to the Navy; company knowledge and reactions

In late June, with Chapman's backing and encouragement, Skomski began to raise complaints with a Navy contract compliance official, Ken Allen, about WestPac's alleged fail-

[50] Fitzgerald, without contradicting Skomski's version of the words he used, also testified that he limited this instruction by telling Skomski to confine his organizing efforts to ''prior to work, during breaks, and after work.'' Assuming, without deciding, that Fitzgerald so particularized his instruction to Skomski, there is no evidence that Skomski violated such instruction at any time thereafter. (Indeed, Fitzgerald testified that Skomski agreed to follow these instructions, and Fitzgerald acknowledged that he got no further complaints about Skomski after that.) Neither is there any evidence that WestPac maintained any rule or policy banning conversation between and among employees while they worked together. Neither is there any evidence that Skomski's pre-July 22 ''union talk'' with other employees interfered with or disrupted anyone's work, as distinguished from offending the sensibilities of Steve Jr.

ures to conform to required safety practices, and to maintain appropriate journeyman-apprentice ratios on the job, and to pay the appropriate Davis-Bacon ''prevailing wage'' to certain workers. In the last week of July, the Navy responded by posting a notice at the jobsite outlining workers' Davis-Bacon rights and inviting WestPac employees to furnish information about any violations of ratio or pay requirements they might know of. In the following days, Skomski met several times with the Navy's chief contract compliance officer for the project, Timothy Sharrett, and furnished Sharrett with more details about whom WestPac was using on the project, and how it was classifying and paying them. (In this same period, Local 191's Chapman likewise met with Sharrett, and pressed him for action on apparent ratio and Davis-Bacon violations by WestPac.) Sharrett then conducted a ''spot-check'' of WestPac's payroll, and later called for a full, ''100 percent review'' of WestPac's day-by-day employment and payroll records for the project for the last 4 to 5 months.

This latter, ''100 percent review'' meeting was held on the morning of August 6, and was attended by Lilleberg and Campbell for WestPac, and also by Warren Johnson, a representative of the general contractor for the Navy-Everett project, M. A. Mortenson. The August 6 meeting had been set up among these parties on August 3 or 4, after Sharrett had delivered a letter dated August 3 to M. A. Mortenson noting that ''various [WestPac] employees are not being paid the appropriate Davis/Bacon Act wages . . . [,]'' and that the ''total amount shorted to employees equals $27,559.20.''

It is apparent that Lilleberg believed that the Unions were behind the complaints that had led to the Navy's investigation. Thus, crediting Sharrett's undisputed testimonial account of the August 6 meeting, I find that Lilleberg bitterly stated more than once during that painstaking payroll reconstruction and rationalization session that ''if it wasn't for the damn union, he would not be here right now.'' Moreover, based on the three undisputed circumstances summarized next, it is reasonably clear that Lilleberg knew before Skomski's ''layoff'' that Skomski was the main source of the information that had triggered the Navy's investigations.

First, Project Manager Coers had admittedly learned sometime in mid-July from M. A. Mortenson's representative, Johnson, that Skomski was the worker who had been complaining to the Navy that WestPac was guilty of ''safety'' violations and ''skewed'' journeyman-apprentice ''ratios,'' and Coers had admittedly passed this information on to WestPac's controller, Campbell. I presume that Campbell, in turn, transmitted this information to Lilleberg. (Campbell and Lilleberg labored closely together in the retrieving and rationalizing of hiring and payroll records in response to the Navy's increasingly widening demands for such records. It would have been unusual, indeed, if Campbell had not told Lilleberg that she had learned from Coers that Skomski was the source of their records-gathering headaches.)

Second, crediting Skomski, I find as follows: Not long before the Navy's Sharrett delivered his August 3 letter to M. A. Mortenson accusing WestPac of having ''shorted'' its workers' pay by more than $27,000, Skomski had told an assembled group of WestPac's employees that WestPac's liability would amount to around $35,000.[51] One of the listeners in this group was Steve Jr., who sarcastically asked Skomski if he had spent his weekend working out these calculations, to which Skomski baitingly replied that he hadn't needed to, because he had ''Tim Sharrett doing the calculating for me.'' Upon hearing this, Steve Jr. hastily left the group, walked to his car, and made a telephone call from his car phone. Absent any other explanation in the record for Steve Jr.'s behavior, it is most likely, and I find, that Steve Jr. was calling his father or some other WestPac official, and that he was reporting what Skomski had just said.

Third, the uncontradicted testimony of Ralph Ridley—supposedly the ''long-term employee'' for whom WestPac needed to ''make room'' by laying off Skomski—strongly suggests that Skomski and his whistleblowing was the subject of cautiously phrased discussions between Coers and Lilleberg witnessed by Ridley on August 4. Thus, crediting Ridley, I find, as follows: On August 4, while waiting for Lilleberg to free himself for a prearranged lunch date (infra), Ridley overheard Coers and Lilleberg discussing the Navy-Everett job, and particularly, the (unspecified) ''problems'' they were having on that job with a certain (unnamed) ''individual.'' Coers asked Lilleberg what to do about this ''individual.'' Lilleberg replied, ''Just fire him; we'll worry about the problem later.''

4. Particulars of Skomski's departure

On August 6, at about 2:45 to 3 p.m., Fitzgerald called Skomski to the job trailer and told him he was being laid off to ''make room for a longer-term employee.'' Fitzgerald also said that this instruction had come as a ''surprise'' to him, and that he had no problems with Skomski's work. Skomski left the trailer to seek out Navy agent Sharrett, but could not locate him. He then returned to the trailer and sought and got Fitzgerald's confirmation that he was considered ''eligible for rehire.''

Fitzgerald, filling in the immediate background, credibly testified, and I find, as follows: Fitzgerald played no personal role in the decision to lay off an employee that day, much less did he pick Skomski for layoff.[52] Rather, on the morning of August 6, Coers had merely instructed Fitzgerald that Skomski was to be laid off to ''make room'' for ''a long-term employee coming off another job.'' Coers already had Skomski's final paycheck in hand when he thus instructed Fitzgerald, and he further told Fitzgerald to give the check to Skomski, and to tell him the reason as Coers had just announced it.

Coers added further background details: Among other things, he eventually admitted that his instruction to lay off Skomski had originated with Lilleberg, based on a supposed decision to put former CostCo-Idaho superintendent, Ridley, on the job on Monday, August 9. Coers further admitted eventually that it had been Lilleberg who had declared—

[51] As Skomski and Sharret agree, Sharrett had originally calculated that WestPac had shorted its workers by about $35,000, and had so advised Skomski; but later, on or about August 3, Sharrett made some corrections to his calculations and arrived at the $27,559.20 total.

[52] I specifically credit Fitzgerald on this point, despite Coers' more generalized claim that he and Fitzgerald somehow jointly decided to have a layoff and to select Skomski as the worker to be laid off. Coers elsewhere unconsciously contradicted this when he admitted that it had been Lilleberg himself who had directed the layoff and had instructed that Skomski be laid off, supposedly because Skomski had the least ''seniority.''

quite falsely, as it turns out—that Skomski had the least ''seniority'' on the job. (The record independently shows that journeyman Greg Johnson was first hired by WestPac on July 16—nearly 5 weeks after Skomski's first day at Navy-Everett—and that Johnson spent his first week for WestPac on the CostCo-Idaho job, and was then brought to Navy-Everett at some uncertain point in the week ending August 1, about a week before Skomski was removed from the same job.) Moreover, under circumstances detailed next, Ridley did not, in fact, take over the job left ''open'' by Skomski's layoff—not on Monday, August 9, nor at any time thereafter.

5. Ridley's testimony

The alleged need to make room for Ridley has become the ultimate justification offered by WestPac for having laid off Skomski. However, the claims advanced by Lilleberg in this regard are in conflict with what Ridley himself had to say about this and related subjects. I rely on Ridley's uncontradicted account for the following findings: Ridley's CostCo job in Idaho was nearing completion in late July. However, on Friday, July 23, Lilleberg called Ridley in Idaho and instructed him to get on the next plane back to Seattle, explaining that the general contractor on the Idaho job, Ferguson, was quite unhappy with Ridley's performance as superintendent. Ridley returned from Idaho the same evening, and appeared at WestPac's offices the following Monday, July 26. However, Lilleberg was not in the office that day, and Campbell instructed Ridley to take care of some paperwork associated with the Idaho job. Ridley was still doing such paperwork on July 27, when Lilleberg appeared in the office. Ridley then asked Lilleberg if he would be retained for future WestPac work. Lilleberg replied that the ''jury is still out,'' and that he was still reviewing Ferguson's complaints about Ridley.

Lilleberg later arranged a lunch date with Ridley for Wednesday, August 4. Ridley came to the office on August 4, and it was while he was waiting for Lilleberg that he overheard the initial conversation between Coers and Lilleberg, supra, about the ''individual'' who was causing ''problems'' at the Navy-Everett job. And it was shortly after this, as Lilleberg and Ridley were about to drive to their lunch date, that Coers came up to Lilleberg's car and Ridley heard Lilleberg instruct Coers to ''just fire'' the ''individual'' and to ''worry about the problem later.'' Lilleberg and Ridley then drove to a Woodinville steak house. During lunch, Lilleberg reviewed with Ridley the complaints he had been getting from Ferguson agents about Ridley's Idaho performance, including several suggesting that Ridley had a drinking problem. Ridley angrily denied this latter, and otherwise defended his stewardship of the Idaho job. Eventually, their discussion turned to the future. Lilleberg said he was under pressure from Ferguson to fire Ridley, but that he would like to install Ridley on the Navy-Everett job, if he could find some way to ''hide'' Ridley's continued presence on the payroll from Ferguson.[53] Elaborating this possibility, Lilleberg explained that Ridley would be a ''journeyman'' on the Navy job, not a ''foreman,'' but that Lilleberg would expect him nevertheless to ''report back'' about ''activities'' on that job. When Ridley voiced confusion about this proposed ''reporting'' function, Lilleberg assured Ridley that he didn't expect him to do any spying, but vaguely suggested that the experienced Ridley's reports would be valuable, given that the superintendent, Fitzgerald, was himself rather inexperienced. Ridley, seeing no more attractive options available to him, agreed that he would take such work, but Lilleberg did not make a commitment, and the lunch session ended with Ridley expecting that Lilleberg would soon decide whether to implement the proposed arrangement.

Having heard no more from Lilleberg, 1 or 2 days later, Ridley located another job, but he did not advise any agent of WestPac of this until he called Campbell on Wednesday, August 11. Consequently, Skomski's recently vacated job went unfilled on Monday, August 9. It also remained essentially unfilled thereafter, despite WestPac's efforts to recruit yet another replacement for Skomski: Thus, according to Fitzgerald and Coers, when Ridley had not appeared on August 9, WestPac had next sought to bring another electrician coming from the CostCo-Idaho job, Jack DuClos, to the Navy-Everett job. But Fitzgerald testified, and I find, that, after DuClos eventually came to the job some weeks later, he soon asked and was permitted to transfer to another WestPac job, and was not himself replaced at Navy-Everett. (In fact, according to the undisputed summary contained in G.C. Exh. 41, DuClos worked only 12 hours at Navy-Everett, all during the weekly pay period ending Sunday, August 29. Thus, it appears that Skomski's job went unfilled for nearly 3 weeks, then was filled by DuClos for 12 hours, then remained unfilled thereafter.) By this time, however, WestPac and the Navy had worked out a solution to one of the ''problems'' that Skomki's termination had created for WestPac—not enough journeymen to meet the Navy's ratio requirements. The solution was to pay Steve Jr. at the ''prevailing'' journeyman pay rate and carry him on the books as a journeyman, despite the fact that Steve Jr. had not yet received a journeyman's license.

6. Skomski's postlayoff efforts to regain work with WestPac

On Saturday, August 7, as previously noted, a want-ad placed by WestPac appeared in the Seattle Times; the ad stated:

> Electrical. Journey level and apprentices for work in western Washington. Call 1–800–553–9722.

On Monday, August 9, Skomski went to the Meyer-Burlington jobsite and asked Superintendent Engel about the possibility of more hirings there. Engel replied that they would be putting about three more electricians on the job in the next week, but that Skomski would have to apply through ''the office.''

On Thursday, August 12, Skomski got a dispatch through Local 191 to another subcontractor on the Navy-Everett job. After arriving at the jobsite, he noticed no new faces among WestPac's workers, and concluded (correctly) that his recently vacated job with WestPac had not yet been filled. He then spoke with Superintendent Fitzgerald, who confirmed that Skomski's intended replacement (Ridley) had not appeared. Skomski asked to be reinstated, and Fitzgerald said

[53] As Ridley explained this, Ferguson had taken over the funding of WestPac's payroll; therefore, Ridley presumed that Lilleberg's reference to ''hiding'' Ridley from Ferguson had something to do with Ferguson's ability to monitor WestPac's payroll.

that he would love to have Skomski back, but that the decision was up to Coers. Later that afternoon, Skomski called Coers, who told Skomski that he had been laid off to make room for two employees coming off another job, and who then told Skomski to call Lilleberg directly if he wanted to pursue his reinstatement request.

Skomski called Lilleberg on Friday, August 13, and told Lilleberg that inasmuch as his ''replacement'' had never appeared, he wanted his job back. Ignoring this request, Lilleberg accused Skomski of being a ''liar'' who had been ''telling [Lilleberg] one thing to his face and doing another thing behind [Lilleberg's] back.''[54] Skomski countered that Fitzgerald had originally told him he was being replaced by one man, but that Coers was now saying that ''two'' men were being brought in, and Skomski then wondered aloud how many men WestPac felt were needed to replace him. Lilleberg made no direct reply. Then Skomski offered to accept work at Meyer-Burlington instead. Lilleberg replied that he ''wasn't hiring at that site.'' Skomski rejoined that this was contrary to Engel's statement to Skomski earlier in the week. Lilleberg parried by observing that Skomski seemed to know more about WestPac's jobs than Lilleberg himself did. At some later point in the conversation, Lilleberg made what Skomski described as a ''pretty feeble offer of a job down south of Olympia,'' which was about 100 miles from Skomski's home in Burlington. Skomski replied that he preferred the much closer Meyer-Burlington site, and Lilleberg closed the conversation by saying, ''Keep in touch.'' (Crediting Duncan's undisputed testimony, I find that Lilleberg told Duncan at an uncertain point that he had just completed a telephone conversation with an unnamed ''union man'' seeking work, and that he had discouraged the applicant by saying that he only had work at a job that was ''100 miles'' from the applicant's home, which would make it too ''inconvenient'' for the man to accept the job. While it is not certain that Duncan was describing the aftermath of Skomski's call to Lilleberg, as opposed to some other inquiry from some other known ''union man,'' her testimony nevertheless satisfies me that Lilleberg's ''feeble offer'' to Skomski was not advanced in good faith, but as a dodge.)

7. Analysis and conclusions regarding Skomski's termination

As I have found, upon his receipt of the July 1 letter from Local 46, Lilleberg had declared in Duncan's presence his intention to find ways to rid himself of Skomski and others named on the July 1 letter or suspected of being associated with the organizing efforts. Wholly apart from other findings above and below showing that Lilleberg was determined to resist the Union's organizing drive by various unlawful means, this animus-laden declaration alone was enough to establish, prima facie, that Skomksi's known status as an employee bent on organizing for the Unions was a ''motivating factor'' in Lilleberg's later decision to permanently lay him off.[55] Therefore, the only remaining question in the case of Skomski's termination is whether or not WestPac met its *Wright Line* burden of demonstrating that Skomksi would have been terminated on August 6 even absent his protected activities. I judge that it did not; indeed, I judge that WestPac's attempts to meet this burden were again so shot through with internally inconsistent or implausible assertions that its defense tended, on balance, merely to reinforce the General Counsel's prima facie case.

Thus, Coers at first tentatively tried to explain the need for an August 6 layoff in terms of factors other than the need to ''make room for a long-term employee,'' such as a work interruption occasioned by rain and mud conditions and/or by the Navy's delays in deciding how to deal with the installation of an electrical vault. But these claims did not themselves survive scrutiny,[56] and WestPac has apparently abandoned them, for it now rests its defense solely in terms of a supposed need on its part to ''make room for Ridley.''[57] Even so understood, however, the defense lacks credible substance. Thus, on brief, WestPac invokes Lilleberg's vague testimonial assertion that he had arranged with Ridley even before Ridley returned from Idaho that Ridley would be moved to the Navy-Everett job as soon as he wound up his paperwork for the Idaho job. But Lilleberg was no more impressive when he uttered this claim than in other instances I have noted where his demeanor suggested to me that he was simply improvising. And in any case, Ridley more convincingly contradicted Lilleberg's claim of such a prearrangement; he credibly testified, in substance, that even as late as July 27, after his hasty return from Idaho, the ''jury

[54] Lilleberg was not invited to contradict Skomski's account of this exchange, much less to explain what he may have meant in thus accusing Skomski of being duplicitous. Considering all the known circumstances, I find that Lilleberg's outburst to Skomski on August 13 was based on Skomski's having secured his job with WestPac without having disclosed his IBEW affiliation or organizing intentions.

[55] No party has coherently raised or argued the question whether Skomski's whistleblowing to the Navy about WestPac's noncompliance with the Navy's ratio and prevailing wage requirements was itself ''concerted'' activity for employees' mutual aid and protection, independently protected by Section 7 of the Act, within the meaning of *Meyers Industries (II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). What is clear in any case is that Lilleberg perceived that the Unions were behind Skomski's complaints to the Navy, and it is reasonable to infer that he likewise perceived Skomski's whistleblowing as merely a manifestation or extension of his organizing activities on the Unions' behalf. Considering all this, I will not decide whether Skomski's whistleblowing was activity independently protected by the Act, nor will I try to assess how much influence Skomski's whistleblowing might have had on Lilleberg's decision to terminate him.

[56] The General Counsel introduced reports from the United States Weather Service showing, in substance, that there were no inclement conditions in Everett during the week preceding Skomski's termination. And job superintendent Fitzgerald contradicted Coers' claims about delays associated with the installation of the electrical vault. Thus, Fitzgerald credibly and specifically recalled—and I find—that the delay associated with the vault did not occur until after Skomski had already been laid off, and that this delay did not in any case require the layoff of any electricians, but merely the reassignment of them to other work at the same site. Indeed, Fitzgerald clearly affirmed that he was aware of no condition as of August 6 that might have warranted a layoff, and that he was entirely surprised by Coers' directive that day to terminate Skomski to ''make room for a long-term employee.''

[57] Actually, it is WestPac's general position on brief (p. 55, first paragraph) that Skomski was ''laid off for lack of work.'' But this is a position which briefing counsel immediately qualifies by explaining it in terms of the ''make room for Ridley'' defense. Id., second paragraph.

was still out'' about Lilleberg's future intentions concerning Ridley, and that it was not until Ridley's August 4 lunch meeting with Lilleberg that there was any discussion of Ridley's being moved to the Navy-Everett job.

In addition, relying on Ridley's account, and in the absence of any counter-explanation by WestPac, I have found that Skomski was the ''individual'' causing ''problems'' at Navy-Everett whom Lilleberg and Coers were talking about before lunch on August 4. Likewise from Ridley's account, I have found that it was on August 4, prior to Lilleberg's lunch meeting with Ridley, that Lilleberg ordered Coers to ''fire'' the ''individual'' (Skomski). And because of this timing, it is obvious that Lilleberg had made a decision to fire Skomski before Lilleberg had even proposed to Ridley that he take a ''journeyman'' position at Navy-Everett. At most, therefore, I would find from the credited evidence that Ridley's return from Idaho presented Lilleberg for the first time with a potential excuse for implementing his previous vow to get rid of Skomski and others of his IBEW ilk, but I could hardly find that Lilleberg's decision to ''fire'' Skomski was based on some preexisting arrangement with Ridley to bring Ridley to the Navy-Everett job.

Moreover, and apart from the fact that Lilleberg's decision to fire Skomski preceded his ''arrangement,'' hypothetical as it was, with Ridley, WestPac still has not plausibly demonstrated that Skomski would have been the inevitable target for a layoff to ''make room for Ridley.'' Skomski was not, in fact, the least senior journeyman on the job, and I simply do not accept Lilleberg's or Coers' assertions that they nevertheless believed, however mistakenly, that this was the case. Neither has WestPac plausibly explained in nondiscriminatory terms why Skomski was not recalled to Navy-Everett when, contrary to the supposed prearrangement with Ridley, Ridley did not, in fact appear on the jobsite on Monday, August 9. True, Coers testified that after Ridley failed to appear on August 9, WestPac next planned to bring former CostCo-Idaho worker DuClos to Navy-Everett. However, I have already noted that nearly 3 more weeks passed before DuClos was actually brought to that site, where he worked only 12 hours, before being reassigned to another project. I note as well that Skomski was clearly available and willing to return to the job at all times during this same period. Accordingly, even if WestPac's ''make room for Ridley'' defense devolved ultimately to a ''make room for DuClos'' defense, the fact that WestPac allowed Skomski's job to go unfilled for several weeks tends in the end merely to show WestPac's determination at all costs to keep Skomski off the project, a determination that can only be explained in terms of its known hostility to his IBEW membership and protected activities on behalf of the Unions. Neither has WestPac explained why Skomski was not called for other work opportunities which were plainly available throughout the balance of August. Thus, WestPac had placed a want-ad for journeymen and apprentice electricians on August 7, the day after Skomski's layoff; and Engel admits, and the record independently shows, that WestPac hired additional journeymen and apprentices at Meyer-Burlington and elsewhere in the weeks following Skomski's August 9 inquiry to Engel.

Accordingly, WestPac's attempts to satisfy its *Wright Line* burden fell woefully short of carrying that burden, and I thus conclude as a matter of law that when WestPac permanently laid off Skomski on August 6, it violated Section 8(a)(3), and, derivatively, Section 8(a)(1) of the Act.

E. *WestPac's Increasing Hiring Vigilance; Its Failure to Hire 29 IBEW-Linked Applicants*

1. Recapitulation and elaboration of some pertinent surrounding facts

I have found from Catherine Duncan's testimony that when Lilleberg received the July 1 letter from Local 46, he told management associates Peterson and Campbell in Duncan's presence that he intended to ''gradually lay off'' any known IBEW member-electricians currently working for WestPac and to ''not hire union'' in the future. In addition, crediting Duncan's undenied testimony on this point as well, I further find that on an uncertain date in the second half of August, as Lilleberg and Campbell were ''formulating an answer to a letter from the National Labor Relations Board,''[58] Lilleberg told Campbell, ''I will never hire union again.'' Campbell commented that ''he shouldn't say that[,]'' and Lilleberg replied, ''I know; but that's how I feel.'' I have also found that Lilleberg disclosed to Personett on July 22 (and to Duncan at a nearby point) that he was trying to limit the numbers of ''union'' workers on any given jobsite, and that Lilleberg, unaware of Personett's IBEW membership, encouraged Personett on July 22 to ask other electricians Personett might know to apply for work with WestPac. Similarly, crediting Duncan's undenied testimony, I further find that, ''[i]n late July,'' Duncan heard Lilleberg tell Campbell that,

> . . . [t]here are not enough non-union people in Washington. The ads—the applications which were coming in, he knew that they were mostly union, that somehow the union was stacking the applications. They had so many people applying, he said that he was going to ask everybody to please try to find out if their brothers or neighbors or anybody they knew wanted to work, their friends or high school buddies.

Moreover, amplifying on this same incident during later direct examination, Duncan testied credibly as follows:

> A. He [Lilleberg] said that he was concerned about—he said that there weren't enough union [sic][59] people in Washington, that he wasn't sure if he would be able to find enough men to hire.
>
> And so . . . he said that he was going to ask everybody to find if they had any brothers or neighbors or anybody who would like to work for West Pac to ask friends and family members, to try to find non-union people and make it a family business.

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[58] On August 18, Local 191's Chapman had filed an unfair labor practice charge in Case 19–CA–22891 alleging that WestPac had fired Skomski for unlawful reasons. So far as this record shows, this charge was the only matter involving WestPac before the Board in late August. Therefore, from Duncan's account of the timing, I infer that the ''letter'' from the Board that triggered the discussion between Lilleberg and Campbell was a letter seeking WestPac's response to the ''Skomski'' charge in Case 19–CA–22891.

[59] The sic is in the original transcript. Duncan soon clarified that she had meant to say ''nonunion'' in this passage.

I have found that Lilleberg implemented the first of his vows—to ''gradually lay off'' known or suspected IBEW adherents—by effectively firing both Scott and Skomski. I recall further that the day after Skomski's termination, on August 7, the Seattle Times began to run an ad placed by WestPac seeking electricians for work in western Washington, but that WestPac did not identify itself as the employer, and used a toll-free number for replies, rather than its own business telephone number. Absent any other explanation for this kind of anonymous advertising for help, I infer from the surrounding circumstances as I have found them that WestPac hoped through anonymity to avoid putting the Unions on notice of its further hiring intentions, and thereby to enhance the likelihood that any responses to the ad would not come from would-be IBEW salts.

I also recall that, at roughly the same time in late August that Lilleberg vowed to Campbell that he would ''never hire union again,'' Lilleberg began working up a new, six-page application form, which he introduced in the last week of August or the first week in September. I note in this regard that Lilleberg admitted that the new form was designed to allow WestPac to get more details about the identity and background of job applicants than its earlier, one-page form had permitted. (And, as I shall find below, Superintendent Johnston told electrician Tim Beyer, in substance, that the new form was being used as a part of a ''screening'' program developed by WestPac to deal with the increasing number of applications it was getting from ''union salts.'')

Finally, I recall that on September 17, WestPac placed yet another want-ad, but this time only in a paper published in Riverside, in southern California. Significantly, as the parties stipulated, this ad stated:

> Electrical journey/wire person; commercial/industrial; Seattle, Washington; call 1–206–486–8800.6.

In this latter regard, Duncan's undenied testimony discloses several other facts worth noting: She testified, and I find, as follows:

> . . . at the end of August . . . Steve [Lilleberg] said—well, he told me that we were going to place an ad in a Riverside, California, paper and it was my job to place that, to call the newspaper and line up the billing, all that.
>
> Q. In giving you that instruction, did he tell you anything else about why Riverside?
>
> A. No. I asked Casey Campbell why.
>
> She said that—She told me that Bob Peterson had suggested Riverside, California, because the economy was depressed and there were many unemployed people there. Bob felt that it would be a good place to get applications out of.
>
> Q. Did you place the ad in the Riverside, California, newspaper?
>
> A. Yes.
>
> Q. Are you aware of whether or not West Pac had any jobs in or around the Riverside, California, area?
>
> A. West Pac had no jobs in the State of California.

Although none of WestPac's agents disputed Duncan's testimony, Lilleberg nevertheless insisted, in substance, that he did not intend through the ad in the Riverside paper to recruit southern California residents for work in western Washington, but instead to ''test the market'' to determine what kind of a labor pool might be available to WestPac in southern California if WestPac might in the future choose to bid on work in southern California. This explanation implies a certain calculating cynicism on Lilleberg's part, for Lilleberg admitted that he had no work in California then or thereafter, and therefore, it appears that Lilleberg was willing to tantalize unemployed electricians in southern California with help-wanted ads for jobs that didn't exist. But I give Lilleberg's explanation no special weight as a self-embarrassing exculpatory assertion; rather, I reject it as an utterly implausible one, not least because the ad could only have been understood by its southern California readers as indicating the availability of work in the ''Seattle, Washington'' area.[60] Rather, I find that the Riverside ad, like the anonymous August 7 ad placed in the Seattle Times, was intended by Lilleberg (a) to solicit applicants for WestPac's work in western Washington, (b) to do so in a way likely to escape the Unions' notice, and (c) thereby to get applicants who would be less likely to be functioning as salts for the Unions.

In the subsections which follow, I will describe additional events in late July through September which likewise tend to show that WestPac grew increasingly vigilant during those months in trying to ensure that it would ''not hire union.'' I will conclude that in some instances described below, WestPac agents engaged in unlawful interrogations or otherwise coerced applicants as part of this program of heightened scrutiny. I will also address in this section WestPac's allegedly unlawful refusal to hire 29 IBEW-linked jobseekers who made applications for WestPac jobs in the late July through September period. I will deal first with the contrasting experiences of certain individual applicants in July and August, with emphasis on the experiences of 10 of the nonhired alleged discriminatees. (These are, in alphabetical arrangement, Marty Aaenson, Randy Allen, John Fraine, Mike Grunwald, Ross Inglis, Joseph Sumrall, James Thompson, John Thornton, David Wagster, and Wayne Wright.) Thereafter, I will address the common experiences of Local 76 agent Grunwald and 19 others (separately listed, infra) who submitted ''overt'' IBEW applications during group visits to WestPac's offices in Woodinville on September 20 and September 27.

2. Analytical approach to alleged ''refusal-to-hire'' violations

The prosecution's charge that WestPac unlawfully refused to hire the 29 jobseekers discussed in this section is a charge whose validity in each instance ''turns on employer motive,'' and therefore it is one that requires a Wright Line analysis in each instance. *Chicago Tribune Co*., 300 NLRB 1055 fn. 3 (1990), citing *Frank Black Mechanical Services*, 271

[60] On brief, WestPac tries to make this claim more plausible by citing Duncan's acknowledgment that Lilleberg was interested in bidding on ''Navy'' jobs, and by noting that the San Diego area was where such Navy work might be secured. However, San Diego is in the yet-more-southern California County of San Diego, not in Riverside County, and San Diego is not within reasonable commuting distance from most of the areas in Riverside County served by the Riverside paper. And I note further that WestPac admittedly did not place a similar ad in any paper in the city or county of San Diego.

NLRB 1302 fn. 2 (1984). To determine in each instance whether or not the General Counsel has established the requisite prima facie showing of unlawful motivation, I will be guided to a large extent by the Board's summary in *Big E's Foodland*, 242 NLRB 963, 968 (1978), of the ''elements'' of proof needed to make out a ''discriminatory refusal-to-hire case,'' as follows:

> [T]he employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

However, more needs to be said about the final ''element'' listed above in *Big E's Foodland*, which seemingly requires a showing, over and above the other elements set forth in that case, that the employer ''refused to hire the applicant because of such animus.'' I think this latter element needs to be understood in the light of the Board's superseding analytical approach to discriminatory ''motive'' cases set forth in its later *Wright Line* decision, which introduced notions of burden-shifting (251 NLRB at 1086–1089) not clearly anticipated by *Big E's*. Thus, after *Wright Line*, supra, I think a showing that an employer refused to hire an applicant because of its hostility to union or other protected activities can no longer be sensibly understood as being itself one of the ''elements'' in the General Counsel's prima facie case of wrongful motivation. (Indeed, if it were so understood, we would be back to the analytical tail chasing and other kinds of ''intolerable confusion'' in alleged wrongful motive cases that the *Wright Line* Board clearly wished to ''alleviate'' (251 NLRB at 1089) by adopting the burden-shifting scheme embraced by the Supreme Court in an analogous context in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).) Rather, after *Wright Line*, it seems more appropriate to think of the because of animus requirement in *Big E's* not as an ''element'' of the General Counsel's prima facie case, but as the ultimate conclusion that must be reached to justify a finding that the alleged discrimination violated the Act. Even more precisely, in the context of cases raising discriminatory refusal-to-hire issues, I think the because of animus feature should be understood, after *Wright Line*, as the ultimate conclusion the Board will draw about the employer's ''real'' motive for the nonhire of an applicant if (a) the General Counsel has established, prima facie, that an applicant's actual or perceived association with a union was ''a motivating factor'' in the employer's failure to hire that applicant or to consider him or her for hire, and (b) the employer fails to ''refute'' that inference by itself ''demonstrating'' that the applicant would not have been hired even absent his or her known or suspected prounion status.[61] Thus, roughly consistent with all but the last of the ''elements'' listed in *Big E's*, supra, I will judge that the General Counsel's prima facie burden in each case of alleged discriminatory refusal to hire is satisfied upon showings that (a) WestPac was hostile to (i.e., ''maintained an animus against'') the idea of IBEW representation of its electricians; (b) it received an application for work from the alleged discriminatee; (c) it knew or believed that the alleged discriminatee was an IBEW member or sympathizer; (d) it failed to hire the alleged discriminatee; and (e) it was hiring or seeking to hire employees at the time or after it received each alleged discriminatee's application.[62]

Despite WestPac's arguments to the contrary, It is clear, based alone on findings I have already made, that the General Counsel has established that WestPac was not merely hostile to IBEW representation of its workers, but that Lilleberg had specifically and unequivocally vowed that he would ''never hire union again'' so as to avoid the possibility of IBEW representation of his workers. In addition, WestPac concedes that it received the applications of all but 3 of the 29 alleged discriminatees, that is, all but Aaenson, Allen, and Wright, and it further concedes that it did not hire any of the 29 alleged discriminatee applicants. Moreover, it concedes that it hired at least 29 other applicants while the applications of 26 of the 29 alleged discriminatees were admittedly reposing in its files. In many cases, however, WestPac challenges the sufficiency of the General Counsel's proof that WestPac knew or believed that an alleged discriminatee applicant was an IBEW member or sympathizer. For reasons more particularly noted below, I will conclude, contrary to WestPac's arguments in certain cases, that the General Counsel has met its prima facie burden under *Wright Line* as to each of the 29 alleged discriminatee applicants, i.e., that their known or perceived IBEW membership or sympathies was a motivating factor in WestPac's failure to hire them or to consider them for hire.

Significantly, moreover, I can discern no instance where WestPac has sought to defend its nonhire of any of the 29 applicants on the ground that no jobs were available for them during the period their applications reposed in WestPac's files. Especially in these circumstances, therefore, I will treat WestPac's discrimination against the 29 applicants as tantamount to an unlawful ''refusal to hire'' them. See, e.g., *Ultrasystems Western Constructors* (decision on remand), 316 NLRB 1243, 1244 (1995); *KRI Constructors*, supra, 290 NLRB at 811. However, such a refusal-to-hire violation will not automatically imply a finding that each named

[61] See, e.g., *Casey Electric*, supra, 313 NLRB 774. See also *KRI Constructors*, 290 NLRB 802, 811 (1988), which, although referring to the ''elements'' set forth in *Big E's*, applies a *Wright Line* analysis, and does not treat the ''because of animus'' feature as an independent element in the the General Counsel's prima facie case.

[62] There is a suggestion in *Casey Electric*, supra, 313 NLRB at 774, that it might be part of the General Counsel's prima facie burden in a ''hiring discrimination'' case to show—in addition to the employer's antiunion animus and its nonhire of an applicant known or suspected to be union affiliated—that the employer ''had appropriate openings for the applicants at the times they filed applications.'' Although I think this suggestion runs counter to the overall teachings of *Wright Line* regarding the allocation and shifting of burdens, I will assume, arguendo, that the General Counsel indeed bore such an affirmative burden. And based on more detailed findings above and below, I conclude that the General Counsel has carried this burden. (In summary, the record shows that WestPac was at material times advertising for and hiring electricians at times when the 29 alleged discriminatees' applications were filed or at times when their applications were reposing in WestPac's files—indeed, that WestPac hired 18 electricians in August, 19 in September, and 5 more in October—and that WestPac was in the same period systematically conducting a program to ''screen out'' prounion applicants. *Casey Electric*, supra at 775.)

discriminatee victim is entitled to hire or to backpay. Rather, consistent with the Board's established approach in comparable situations, I will not purport to decide which applicants would have been hired, much less where or when or for how long they might have worked if they had been given nondiscriminatory consideration; rather, I will treat any examination into such questions as one properly to be deferred to the compliance stage. *KRI Constructors*, supra, 290 NLRB at 812, and case cited therein; *Ultrasystems Western Constructors*, supra, 316 NLRB at 1244.[63]

3. Hiring of Ken Jennings at Eagle-Puyallup

On July 27, Ken Jennings, who was not then an IBEW member, went to WestPac's Eagle-Puyallup jobsite to seek work. Jennings lived in nearby Tacoma, and he had been encouraged to apply by covert salt Personett, after Lilleberg had himself urged Personett to refer his former work colleagues to WestPac. Crediting Jennings' undisputed account concerning the events described next,[64] I find as follows: Jennings spoke at the site with Superintendent (and 10-percent owner) Peter (P.J.) Johnston. After reviewing Jennings' work experience and the pay rates on the Eagle-Puyallup job, Johnston said, ''We're a nonunion shop.'' Jennings replied that he was not a union member and had never worked for a union contractor.[65] Johnston then told Jennings that ''everything looks good,'' but also told Jennings that his hire was subject to clearance by Lilleberg. Johnston then gave Jennings the one-page application form that WestPac was still using at this point, and Jennings took it home and completed it the same afternoon. Jennings also called Lilleberg the same afternoon, and Lilleberg, too, said that Jennings' prospects for hire were good, and asked Jennings to come to the Woodinville office for an interview.

Jennings did so on July 28, and during the interview, Lilleberg repeated that WestPac was a nonunion shop, but also disclosed that the Unions were trying to organize WestPac, and that Lilleberg could not be sure that WestPac would remain nonunion. Jennings remarked that he was not a union member. During the interview, Jennings made a point of saying that he was interested in working ''through the winter . . . full time.'' Lilleberg replied that there was ''no problem with that.'' (I will deal elsewhere below with WestPac's allegedly discriminatory layoff/discharge of Jennings on October 8.)

4. Hiring of Dave Bonnickson at Meyer-Burlington; 8(a)(1) interrogation by LaRoche

a. *Facts*[66]

On August 3, Dave Bonnickson, who had recently received a Washington journeyman's license, but who did not become an IBEW member until early September, came to the Meyer-Burlington jobsite looking for work. Bonnickson lives north of Burlington, near the Canadian border. He had been referred to the job not by any union, but by his wife, who had driven past the Burlington site one day and had noticed the construction. After arriving at the site, Bonnickson spoke briefly with Superintendent Engel, who gave Bonnickson a one-page application form and told him to complete it and return the next day for an interview with Project Manager LaRoche.

Bonnickson returned on the morning of August 4 and gave his completed application to LaRoche. In this meeting, they discussed Bonnickson's prior commercial experience, and LaRoche emphasized that the work at Meyer-Burlington was ''fast-paced,'' because WestPac was working under a deadline to complete the job by ''October.'' LaRoche then said, ''I hope you're not a member of the union, because we're a nonunion contractor.'' Bonnickson assured LaRoche that he was not a union member, and LaRoche promised to get in touch with Bonnickson.[67] When Bonnickson arrived back at his home about an hour later, he found a message from Engel that he had been hired, and was to report the next morning, August 5, which he did. (I will deal elsewhere below with Bonnickson's participation in the later strikes at Meyer-Burlington, and with WestPac's allegedly discriminatory treatment and eventual discharge or ''permanent replacement'' of Bonnickson in the aftermath of those strikes.)

b. *The 8(a)(1) analysis and conclusion*

Bonnickson's testimony supports paragraph 7(a) of the complaint, which alleges that LaRoche unlawfully interrogated ''employees'' [sic] about their union membership and activities in ''early August.'' Bonnickson's credited testimony about his August 4 interview with LaRoche shows that LaRoche did not directly pose a question to Bonnickson, but instead declared, ''I hope you're not a member of the union, because we're a nonunion contractor.'' I find that this formulation was a familiar rhetorical device designed to elicit a response, and therefore I judge that LaRoche effectively questioned Bonnickson. Moreover, the particular form of LaRoche's question (''I hope you're not a member.'') nec-

[63] Moreover, because WestPac did not seek to litigate questions of job availability for the alleged discriminatees at the ''liability'' stage of this case, we are not presented with a potential for a ''fracturing of the liability determination from the remedy determination'' like that discussed with concern by the Fourth Circuit in sec. IV of its remanding opinion in *Ultrasystems Western Constructors v. NLRB*, supra, 18 F.3d at 258–259.

[64] The central features of Jennings' testimony discussed in this section are his prehire interviews with Johnston and Lilleberg, neither of whom denied any aspect of Jennings' version of those events.

[65] Johnston broadly acknowledged, both from the witness stand and in a pretrial affidavit to the Board, that it was common for him to tell an applicant that WestPac was ''nonunion,'' but only when, so he testified, he could discern from the applicant's work history that the applicant had worked for a known ''union'' contractor in the past. This practice, said Johnston, traced from his wish to be ''up front'' with union member jobseekers, so that they would not unwittingly face the prospect of a union fine for working for a nonunion contractor. Clearly, however, this broad explanation would not genuinely account for Johnston's having declared to Jennings that WestPac was nonunion, for his declaration preceded any indication from Jennings about his union or nonunion status.

[66] For findings below, I rely on Bonnickson's credibly narrated accounts.

[67] Although LaRoche denied that he asked Bonnickson about his union membership, his overall account of his prehire interview with Bonnickson was rather vague, and I have no confidence that LaRoche would be able to accurately recall whether or not he thus questioned Bonnickson. Moreover, considering other findings above and below showing that WestPac agents engaged in a pattern of trying to identify and screen out ''union'' applicants in late July and thereafter, I deem it more probable than not that Bonnickson's account was accurate.

essarily implied that union membership would be incompatible with Bonnickson's employment by WestPac, and it thereby independently conveyed an unlawfully coercive message. *Rolligon Corp.*, 254 NLRB 22 (1981). See also, e.g., *Thermodyne, Inc.*, 312 NLRB 1175, 1181 (1993). And again, this is ''circumstance'' enough under *Rossmore House*, supra, and *Sunnyvale Medical Clinic*, supra, to find that the interrogation was unlawful. In any case, LaRoche's interrogation of Bonnickson was obviously not an ''isolated'' instance of mere ''casual questioning.'' Rather, based on findings above and below, I judge that LaRoche's questioning was an element of a deliberate program on WestPac's part to implement Lilleberg's vow, first made upon his receipt of the Unions' July 1 letter, to ''not hire union.''

Accordingly, I conclude as a matter of law that when LaRoche effectively asked Bonnickson if he were a union member and simultaneously implied that union membership was incompatible with work for WestPac, WestPac violated Section 8(a)(1) of the Act.

5. Thornton's nonhire

a. *Facts*[68]

John Thornton was a Local 191 member and a late-stage apprentice at the time of the events described next, and in recent months he had been receiving dispatches from Local 191's hiring hall to contractors with IBEW agreements. Thornton lived in Mount Vernon, only a few miles from the Meyer-Burlington site. Roughly 9 years earlier, Thornton had worked for Lilleberg as an employee of the nonunion Telon Electric entity, on a project for the Navy at its Air Station on Whidbey Island, in Puget Sound, near Everett.

On or about July 23, Thornton went to the Meyer-Burlington job, and there got a one-page application form from Superintendent Engel, which Thornton took home, completed, and then returned to Engel the next day. Engel, in turn, used a jobsite fax machine to transmit Thornton's application to Lilleberg in Woodinville. On that application, Thornton had listed as ''references'' the nonunion Telon Electric, and his family's own, nonunion electrical contracting firm, Thornton Electric.

On an uncertain date thereafter, Lilleberg admittedly read this application and, admittedly inspired by Thornton's reference to having worked previously for Telon, placed a call to Thornton's home telephone. However, Lilleberg testified that his call was answered by a woman who simply told him that John was ''already working.'' As a consequence, said Lilleberg, he ''moved on'' in his search for workers.

However, based on the far more convincing testimony of Thornton's mother, Pamela Thornton, I find that Lilleberg again told only an edited and highly sanitized version of the truth. Thus, Pamela Thornton testified, and I find, that she took two telephone calls for John on uncertain dates (which she believed were both in ''August''), each placed by someone named ''Steve,'' from ''WestPac.'' (I find that the caller was Lilleberg in each case.) In the first call, she simply told ''Steve'' that John wasn't home, and apparently assumed that ''Steve'' would call back later. However, perhaps 2 weeks passed before Lilleberg made the second call, and in this call he specified that he had a job for John at the Meyer-Burlington project. Pamela Thornton replied that John was currently working on an ''80-hour call for the Union,'' but that she would give John the message and have him call Lilleberg back. Lilleberg replied to this that John shouldn't ''bother'' to call back, adding words to the effect, ''We don't want anybody that works for the union working for us[,]'' and/or that ''he didn't want anybody that was in the union infiltrating his job.''

On August 27, Thornton, like Sumrall, infra, joined Local 191's Chapman and other IBEW member jobseekers in a visit to the Meyer-Burlington site, where, through Chapman, they tried to deliver already-prepared, ''overt salt'' applications to Superintendent Engel. Engel said that he couldn't accept applications at the jobsite, and that the applicants would have to submit them personally at the Woodinville office.[69]

b. *The* 8(a)(3) *analysis and conclusions as to Thornton*

The credited facts speak for themselves: Lilleberg was plainly intent on hiring Thornton for the Meyer-Burlington job until he learned from Pamela Thornton that John was currently working on a ''union'' job, albeit one of apparently brief duration. Upon hearing this, Lilleberg brusquely told Pamela Thornton in substance that John need not ''bother'' calling him back because Lilleberg didn't want any union-associated workers on his jobs. These facts alone present a compelling prima facie case that Thornton's IBEW association was a motivating factor in Lilleberg's failure, after his second call to Thornton's home, to hire Thornton. Indeed, I think the General Counsel is correct in characterizing Lilleberg's final statement to Pamela Thornton in the second telephone conversation as a ''rescinding'' of a job offer based on his discovery of Thornton's IBEW association. In any case, under *Wright Line*, the General Counsel's prima facie showing of wrongful motivation shifted to WestPac the burden of demonstrating that it would not have hired Thornton even absent the fact that Thornton was taking ''union'' jobs.

WestPac's only defense under *Wright Line* relies on Lilleberg's claim that, once he learned that Thornton was working elsewhere, he ''moved on'' to other applicants and, apparently, never gave Thornton any further consideration. However, this is not a motivationally plausible explanation given my earlier findings as to how Lilleberg had actually responded to Thornton's application: Clearly, Lilleberg had an abiding wish to hire Thornton, indeed, he was apparently so interested in Thornton's application that, even though he had been unable to reach Thornton in his first call, he placed a second call to his home some weeks later, and this time unambiguously conveyed to Pamela Thornton a concrete offer of a job for Thornton at Meyer-Burlington. Moreover, when Pamela Thornton told Lilleberg in the later call that John was currently working on an 80-hour union job, Lilleberg made no further inquiries, such as to ask when John's current work was expected to end, or whether John might be willing to leave that short-term job for a longer-

[68] Unless I note otherwise, findings in this section are based on Thornton's undisputed and credible testimony.

[69] I rely on Chapman's credible and detailed testimonial account for findings about transactions on August 27 between Chapman and Engel. Engel's counterversion was vague and impressionistic and I deem it essentially weightless, except insofar as it tends to corroborate Chapman.

term one with WestPac, both of which possibilities Pamela Thornton had left open by offering to have John call Lilleberg back. Rather, Lilleberg simply replied, in substance, that if John was involved with ''union'' work, he shouldn't ''bother'' calling back. It clearly appears, therefore, that Thornton's temporary employment at the time of Lilleberg's second call would not itself plausibly account for Lilleberg's rescinding of his job offer; much less would it explain why Lilleberg never sought out Thornton when he hired additional workers in the weeks and months thereafter.

Accordingly, WestPac has failed to carry its *Wright Line* burden, and I conclude as a matter of law that when Lilleberg rescinded his job offer to Thornton during his second call to Pamela Thornton, and thereafter failed to consider Thornton for employment, WestPac unlawfully refused to hire Thornton and thereby violated Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act.

6. Sumrall's application; Lilleberg's interrogation of him, and Lilleberg's decision to ''file'' Sumrall's application

a. *Facts*[70]

Joseph Sumrall was at material times a Local 191 member and a Washington-licensed journeyman, and, like Thornton, Sumrall lived in Mount Vernon, near the Meyer-Burlington site. Also, like Thornton, Sumrall had years earlier worked for Lilleberg's nonunion Telon Electric entity, including on the Navy's Whidbey Island Air Station job. Lilleberg himself characterized Sumrall in testimony as an ''old friend'' of his.

On August 10, at the urging of Local 191's Chapman, Sumrall went to the Meyer-Burlington jobsite and there got a one-page application form from Engel, which Sumrall completed and gave back to Engel at the jobsite the next day. During this August 11 return visit, Sumrall reminded Engel that he had worked for Lilleberg at Telon Electric. Engel replied that Lilleberg was aware of this, because he and Lilleberg had already discussed Sumrall's interest in work. Engel also told Sumrall that Lilleberg planned to call Sumrall directly to discuss his application. Engel then faxed Sumrall's completed application to Lilleberg in Woodinville. Sumrall's application did not mention his IBEW affiliation nor any work with IBEW contractors; however, Lilleberg admittedly knew from mutual acquaintances in the trade that Sumrall had become an IBEW member since his earlier employment with Telon.

When Sumrall returned to his home on the evening of August 11, he found a message from Lilleberg with a pager number where Lilleberg could be reached. Sumrall called this number and Lilleberg soon called him back. After some small talk, Lilleberg asked Sumrall ''why a good union brother would be applying for a nonunion job[,] or why a good union brother would be willing to work for less money, something like that.'' Sumrall replied that he preferred to ''work in my own backyard.'' Lilleberg then asked if Sumrall ''was going to be selling [his] religion on the job.'' Sumrall, although unsure what Lilleberg meant by this reference, replied that he ''wasn't going to be selling [his] religion,'' but was ''going to be selling the same thing [he] had always sold . . . eight hours of work for eight hours of pay.'' Lilleberg generously replied that he remembered Sumrall as someone who ''usually gave ten hours of work for eight hours of pay,'' and recalled further that ''we had done some really good work in the past together.'' Lilleberg also reminisced that when he and Sumrall had worked years earlier for Telon on the Navy's Whidbey Island job, Telon had been the only nonunion contractor on that job, and that union member workers for other contractors had given Telon's electricians a ''hard time'' for working nonunion, and that, in response, Sumrall had ''glued a little rat onto [his] hat.'' Following such reminiscences, Lilleberg asked Sumrall if he would consider taking work other than at Meyer-Burlington, such as at the Texaco refinery, for example, or perhaps on a job ''on the other side of the mountains.'' Sumrall said that he preferred to work at Meyer-Burlington, and that he ''didn't really want to travel a whole lot.'' When the conversation concluded, Lilleberg had not offered Sumrall a specific job, but had promised to ''check on what was available,'' and to ''get back'' soon to Sumrall.

By August 27, however, Lilleberg still had not called Sumrall back, and on that day, as previously found, Sumrall, Thornton, and other IBEW members, led by Local 191 agent Chapman, unsuccessfully tried to submit new applications to Engel at the Meyer-Burlington site.

b. *The 8(a)(1) and (3) analyses and conclusions as to Sumrall*

I find it reasonably clear from Sumrall's credited account of his conversation with Lilleberg on the evening of August 11 that Lilleberg was quite tempted to hire Sumrall, based on Sumrall's strong performance on Telon jobs in earlier years, and based as well, perhaps, on Sumrall's defiant willingness in that era to wear a ''rat''—an artificial one, presumably—on his hard hat, in the face of jibes from union workers on the same jobsite. However, I also find it reasonably clear from other features of the same conversation that Lilleberg's awareness of Sumrall's current IBEW membership made him suspicious of Sumrall's application, and that his early questioning of Sumrall was intended to get at whether or not ''good union brother'' Sumrall, if hired, would be genuinely willing to work uncomplainingly for a nonunion contractor, or would instead try to ''sell his [union] religion'' to other workers on the job. I conclude as a matter of law that this early questioning of Sumrall in its totality amounted to a coercive interrogation about whether or not Sumrall was disposed to engage in statutorily protected activity. Indeed, Lilleberg's questioning is just as easily characterizable as an unlawful attempt to get Sumrall to make a kind of yellow-dog contract, i.e., a promise that Sumrall would not preach to others in favor of union representation if Lilleberg hired him. Thus, I conclude as a matter of law that when Lilleberg so questioned Sumrall, WestPac violated Section 8(a)(1) of the Act, substantially as alleged in paragraph 7(d) of the complaint.

In addition, recalling that Lilleberg had separately told Duncan and Personett a few weeks earlier that he was trying to ''limit'' the number of union members on any given job, I infer that Lilleberg was moved by the same considerations when he suggested work possibilities to Sumrall on jobs

[70] Unless I note otherwise, findings in this section are based on Sumrall's credible testimony, despite Lilleberg's differing version of a telephone conversation with Sumrall, which latter version I again treat as sanitized and quite unreliable.

other than Meyer-Burlington. Moreover, I deem it independently significant that the only possible ''other'' jobs Lilleberg suggested to Sumrall involved either work at the Texaco refinery, which was notoriously undesirable by comparison to the work at Meyer-Burlington,[71] or would require relocation or unrealistically long commutes from Sumrall's coastal-area home in Mount Vernon to points ''on the other side of the [Cascade] mountains.'' I further recall Duncan's evidence, supra, that Lilleberg slyly held out to a known ''union man'' seeking work the possibility of a job requiring a 100-mile one-way commute, and then admitted to Duncan that he knew his ''offer'' would be too ''inconvenient'' to be acceptable to the caller. Thus, when Lilleberg inquired about Sumrall's willingness to take jobs at the Texaco refinery or ''on the other side of the mountains,'' I would infer that Lilleberg was acting from similarly insincere motives, and was fishing for an answer that might provide the germ of an excuse for not hiring Sumrall. Finally, I infer from the fact that Lilleberg made no further attempt to get back to Sumrall after August 11, that Lilleberg must have decided that he could not trust that Sumrall would refrain from ''selling his religion,'' and had ruled him out for further hiring consideration for that reason.

Considering the foregoing circumstances, I find that the General Counsel made a substantial prima facie showing that Sumrall's IBEW membership was a motivating factor in Lilleberg's admitted decision to ''file'' Sumrall's application, and his apparent decision, as well, to ''forget'' that application thereafter. WestPac's attempt to meet its *Wright Line* burden of rebuttal in the case of Sumrall rests again on a single testimonial assertion by Lilleberg—that he believed from his conversation with Sumrall that Sumrall was ''not really interested in leaving the area in which he was in [sic],'' and therefore, Lilleberg simply ''filed [Sumrall's] application in the area where he lived.'' However, I have inferred that when Lilleberg asked Sumrall about his willingness to take jobs other than at Meyer-Burlington, he was acting from a wish to limit the numbers of IBEW members on that job, and was simultaneously fishing for a potential excuse not to hire Sumrall at all. Moreover, although Sumrall's expressed preference for local work might arguably provide a legitimate excuse for not hiring Sumrall if WestPac had shown that there were no jobs for journeymen available within the ''area where [Sumrall] lived'' during the period Sumrall's application remained ''on file,'' WestPac made no attempt at such a showing; indeed, as I have found above, WestPac hired at least one more journeyman electrician at Meyer-Burlington, covert salt Mike Russell, on August 23, and it hired or transferred yet others to that site in the following weeks, and was still left chronically short-handed at that job (as Engel admitted), as WestPac rushed to complete its inside wiring before the scheduled opening of the Fred Meyer store in the first week of October. Thus, Lilleberg's claim fails even to address, much less answer, a critical question: Why didn't Lilleberg offer Sumrall work at the Meyer-Burlington job, where Sumrall would not have had to travel outside his own ''backyard?''

[71] See my findings, infra, relating to WestPac's transfer in September of certain returning Meyer-Burlington strikers to the Texaco-Anacortes site.

In short, WestPac has not demonstrated to my satisfaction that Lilleberg would have been moved alone by Sumrall's disinclination to travel to ''file and forget'' Sumrall's application. Therefore, I conclude as a matter of law that WestPac's failure and refusal after August 11 to hire Sumrall or to consider Sumrall for hire violated Section 8(a)(3), and derivatively, Section 8(a)(1) of the Act.

7. Local 76 Agent Grunwald's August 11 application; his nonhire thereafter

a. *Facts*[72]

Tacoma Local 76 organizer Grunwald, who holds a Washington journeyman's license and has worked extensively in the electrical trade, came to the Eagle-Puyallup site during a lunch break on August 4, where he then spoke with a number of WestPac workers, including Personett. Grunwald passed out his business cards to several of the workers, and asked them to consider supporting the IBEW and becoming members, noting that the electrical contractor on a neighboring construction project was a ''union company, and that the electricians on that job were getting union wages and benefits'' for work similar to that being done by WestPac electricians. Superintendent Johnston, who admittedly recognized Grunwald as an IBEW official based on previous contacts in earlier years,[73] observed this activity and eventually approached Grunwald and asked him to leave the property. Grunwald asked if Johnston owned the property and Johnston replied that he did not. Grunwald then offered to leave if asked by the owner of the property. Johnston then left, but soon returned with the project manager for the general contractor on the site, who asked Grunwald to leave, which he did, but only after a further brief delay, and only after Johnston threatened to call the police.

When Grunwald got back to his Local 76 office, he called WestPac's office, and, without disclosing his union identity, he asked the receptionist if WestPac was ''looking for journeyman electricians.'' The receptionist confirmed that this was so, and Grunwald asked her to mail him an application to his residence address. (The WestPac receptionist—normally Duncan at material times, but occasionally Campbell in a backup capacity—recorded the names and addresses of persons who called-in for applications. A summary of these records prepared by Campbell was introduced by stipulation in this trial as R. Exh. 9. That exhibit confirms that Grunwald's August 4 request, and his name and home address, were duly noted on a WestPac record on the same day he called.)

Grunwald received such an application in the mail from WestPac in due course, and on August 11, he signed and mailed the completed form back to WestPac, along with a lengthy cover letter, which WestPac received on an uncertain date thereafter. In his cover letter, Grunwald had introduced

[72] Here, unless I note otherwise, I rely on Grunwald's and Personett's largely undisputed accounts of transactions involving Superintendent Johnston, and on Grunwald's undisputed account of transactions between himself and Lilleberg.

[73] Johnston not only testified that he had ''recognized'' Grunwald during his August 4 visit to the site as an IBEW agent, but he also adopted WestPac's counsel's assumption in several questions that he knew even as of August 4 that the visiting organizer's name was ''Mike Grunwald.''

himself, his work history, his wage demands ($17 per hour, approximating the typical rate WestPac was then paying new-hire journeymen on other than Davis-Bacon jobs), and the areas in which he was willing to work (essentially, the counties in the southern half of WestPac's main areas of operation). However, he had not identified himself as an IBEW member, much less had he disclosed that he was a full-time employee of Local 76, nor had he mentioned any prior employment with IBEW contractors. In short, his August 11 cover letter and his application were quite naked of any indication of his IBEW affiliation.

On or about August 11, at the Eagle-Puyallup site, Superintendent Johnston asked Personett if he had retained one of the business cards that the ''organizer'' had passed-out on August 4. Personett said he had not. Johnston then asked Personett if the organizer's name was ''Mike.'' Personett replied that he didn't remember. Johnston then pressed further, asking if the organizer's name was ''Mike Grunwald.'' Personett again said that he could not recall the name. Given the timing of this transaction, and absent any other explanation in the record for Johnston's curiously delayed attempt to confirm on August 11 that ''Mike Grunwald'' was the union organizer who had visited the site on August 4, I find that the following scenario is the most likely one: Johnston's questioning of Personett was prompted by advice from someone at the Woodinville headquarters—presumably Lilleberg—that someone named Mike Grunwald had inquired about openings for journeymen and had asked for an application.[74] Johnston already knew or believed that Mike Grunwald was the name of the IBEW organizer, and he so advised the Woodinville agent, who, in turn, instructed Johnston to try to confirm this, and Johnston, in turn, tried to confirm this through Personett.

On August 25, having heard nothing from WestPac in the meantime, Grunwald called WestPac's offices, spoke directly with Lilleberg, and asked about the status of his application. Lilleberg replied that he had received a ''lot of applications and was in the process of going through them at that time, trying to sort them by proximity to his existing jobs.'' Grunwald suggested that he would be ''willing to travel locally,'' and added, perhaps with ironic intent, that Lilleberg ''would find very few applicants with my kind of qualifications.'' Lilleberg was noncommittal, however, and the conversation soon ended.

Grunwald had further telephone contacts with Lilleberg in late September and early October, during each of which he asked about the status of his application. These followed Grunwald's submission of a new application to WestPac on September 20, on which he had openly disclosed his status as an IBEW-employed organizer, an application, moreover, which he submitted during a mass visit to Woodinville headquarters by a group consisting of Grunwald, Local 46 agents Freese and Walsh, and about 14 out-of-work IBEW members, most of whom wore conspicuous prounion regalia. I will revisit those events later; however, I note here that, during a telephone conversation with Grunwald on September 23, Lilleberg made unmistakably hostile references to Grunwald's role as an IBEW official, or at least as an intended IBEW salt. Thus, crediting Grunwald's undisputed version, Lilleberg remarked to Grunwald on September 23 that he was ''looking for electricians willing to work, and . . . not looking for electricians that were there only to stir up bullshit.'' Moreover, crediting Grunwald, Lilleberg complained to Grunwald that ''he [Lilleberg] did not come into our church preaching his religion, and he did not want us coming into his church preaching ours.''

b. *The 8(a)(1) and (3) analyses; the issue of ''early knowledge''; supplemental findings; and conclusions of law as to Grunwald*

Grunwald's testimony about his September 23 telephone conversation with Lilleberg clearly supports paragraph 10(e) of the complaint, which alleges that on September 23, Lilleberg unlawfully threatened an applicant that WestPac would not hire people who ''stirred-up bullshit.'' Lilleberg's statement to Grunwald clearly betrayed Lilleberg's belief that Grunwald, as an IBEW agent, was someone whose main interest in being hired was to stir up IBEW support among his coworkers, an activity that Lilleberg clearly equated with ''stirring up bullshit,'' and with the unwelcome advocacy of a ''religion'' foreign to his own. Therefore, Lilleberg's statement that WestPac was ''not looking for electricians that were there only to stir up bullshit'' was tantamount to a statement that anyone known or suspected by WestPac to have union organizing intentions would not get hired. Accordingly, I conclude as a matter of law that his statement was unlawfully coercive, and that WestPac thereby violated Section 8(a)(1).

The General Counsel argues that WestPac's unlawful refusal to hire Grunwald began when it failed to hire him immediately following his August 11 application. WestPac's central defense to its failure to hire Grunwald is one I have already rejected—that, as a paid, full-time official of Local 76, Grunwald was not a bona fide employee-applicant. However, WestPac further argues that even if it was not legally entitled to reject Grunwald's application because he was already employed by Local 76, the General Counsel has still failed to make a prima facie showing that WestPac knew, prior to September 20, that Grunwald had an IBEW affiliation. Thus, it bears noting that here, the question is not whether WestPac eventually learned of Grunwald's IBEW affiliation, for it admittedly was aware of that fact by no later than September 20, when Grunwald submitted a new, ''overt salt'' application. (Indeed, on brief, WestPac concedes that it had such knowledge as of September 20, but argues that, ''Lilleberg, at that point, had a sufficient business justification to not hire Mr. Grunwald.'') Rather, the central questions are: Did WestPac have even earlier knowledge, and if so, how early? For reasons I discuss next, I judge that the General Counsel has made a prima facie showing that WestPac knew or believed by no later than August 11 that job applicant Grunwald was an IBEW organizer:

A sufficient basis for finding such early knowledge lies in Johnston's admission that he knew Grunwald's name and his status as an IBEW official as early as August 4, when he threatened to call the police if Grunwald did not leave the

[74] Under the office routine described by both Lilleberg and Duncan, Lilleberg might not learn immediately of the names of persons who had called-in or walked-in for applications. In addition, the record shows overall that it was routine during this period for Lilleberg and his jobsite superintendents to confer about the latter's hiring needs, and for them to discuss the existence and identies of current or potential applicants. (The case of Sumrall, supra, is only one such example.)

Eagle-Puyallup site. By the familiar process of imputation of a supervisor's knowledge of union activities to his own superiors, I may infer that what Johnston knew on August 4 about Grunwald's identity and his IBEW employment soon became known to Lilleberg. Indeed, I would presume that by the time Grunwald called WestPac's office on the afternoon of August 4 and requested an application form from the receptionist, Lilleberg had already learned from Johnston at the very least that an IBEW organizer named ''Grunwald'' had visited the Eagle-Puyallup site, and that Johnston had chased him off. Admittedly, however, under the business routine variously described by Lilleberg, Campbell, and Duncan, Lilleberg would not necessarily learn immediately that someone named Mike Grunwald had also called-in on August 4 and asked for an application. I have already inferred that Johnston's August 11 questioning of Personett was prompted by an instruction from Woodinville to try to confirm that it had been ''Mike Grunwald'' who had made an organizing visit to the site on August 4, and I have assumed that this instruction came as soon as Lilleberg had learned through a routine in-house channel that someone with the same name had asked to be mailed an application. I thus conclude that by no later than August 11, Lilleberg himself had made a connection in his mind between applicant Mike Grunwald and organizer Mike Grunwald.[75]

I am persuaded to the same conclusion by Lilleberg's own waffling on the question of his early knowledge, and his eventual admissions concerning that same question and the related question of why he didn't hire Grunwald. Thus, Lilleberg was asked by the General Counsel, ''when was the earliest that you had that knowledge [of Grunwald's IBEW affiliation]?.'' Lilleberg answered first, ''I guess I don't recall[,]'' but he then professed that it was not until shortly before a June 1994 trial in a Small Claims Court proceeding brought against him by Grunwald that he finally ''[took] the time to find out who he [Grunwald] was.''[76] However, he soon after agreed that he had had ''one or more telephone conversations during 1993 with Mike Grunwald.'' He was then asked, ''Do you recall during at least one of those telephone conversations with Mr. Grunwald in 1993 mentioning his union affiliation?'' He replied, ''Yes—well, to clarify that, I presupposed. I guessed,'' and he soon confirmed that he ''kn[e]w or suspect[ed] it at the time.'' (The ''time,'' however, still remained uncertain, although by now it was clear at least that Lilleberg was referring to a time in 1993.) Still later, counsel for the General Counsel asked him directly to ''please tell us why you did not hire Mike Grunwald.'' Lilleberg replied in a curiously awkward way, first saying, ''I didn't know that I required anybody at that time.'' This set of exchanges between myself and Lilleberg soon followed (emphasis added):

> THE COURT: . . . I understand, as you said in the small claims action and as your attorney has said [in his opening statement in this trial], you didn't think Mr. Grunwald was a bona fide applicant. Correct?
>
> THE WITNESS: Correct.
>
> THE COURT: All right. If I were in the position to hire and I decided that somebody was not a bona fide applicant, I doubt if I would bother to look to see if there were any jobs available. So I'm asking you if you ever even stopped to consider whether there might be work for him back in *August or September*, whenever that was.
>
> THE WITNESS: *I can't say that I did*. But a large part of what happens in relationship to the needs of manpower are derived from the field. And I don't recall specifically any particular needs *at that time* from any of the superintendents. So we certainly *may* have had on file quite a few applications. But there was no need to go through the applications. It was not something that I was full time with.
>
> THE COURT: But you had made the judgment at that time that Grunwald was not a bona fide applicant. Is that correct?
>
> THE WITNESS: Yes, based on conversations—at least one conversation on the phone. I had yet to ever meet the individual. I did not ever meet him until June of '94. I didn't know who he was.
>
> THE COURT: So if I understand you, you didn't even consider trying to match him to a job because you didn't think he was bona fide to start [with]. Is that correct, or—
>
> THE WITNESS: No. First of all, I haven't had, nor did I take the time with the applications. Mr. Grunwald had called me on one occasion that I know of specifically, and we had carried on a conversation. *At that time I didn't see him as a bona fide applicant.*

While Lilleberg's final sentence in the foregoing exchange still left room for doubt as to what he meant by ''at that time'' (i.e., the point at which he *first* determined that Grunwald was not a ''bona fide applicant'') his curious failure to recall whether he had ever even *considered* the existence of job openings when he learned of Grunwald's application supplies a fairly obvious answer, which I adopt as a finding: Lilleberg already knew by the time Grunwald's August 11 application arrived that Grunwald was an IBEW official, and thus doubted Grunwald's bona fides as an applicant

[75] Remarkably, in this connection, WestPac makes the following assertion in its brief (p. 29, emphasis added):

> WestPac applications were given to all who asked—even those who ''*literally wore their union membership on their sleeves.*'' Business agents Jim Freese, John Walsh and *Mike Grunwald* asked for, and received, application forms without the need for deceit.

I presume that WestPac is here referring to the August 4 date when Grunwald ''asked for, and received'' an application form from WestPac. (Counsel cannot be referring to Grunwald's August 20 visit to Woodinville, for on that date, Grunwald and the other en masse applicants, already had such forms in their possession, and had filled them out at the Local 46 hall before traveling to Woodinville to submit them.) Thus, WestPac's statement on brief seems to reflect an admission, however unconscious and in conflict with its position currently under discussion, that WestPac knew of Grunwald's IBEW association at the time he made his August 4 request for an application.

[76] Grunwald claimed in this lawsuit that WestPac had violated state laws banning religious discrimination in employment. The centerpiece of his case was Lilleberg's September 23 statement to Grunwald, supra, to the effect that Lilleberg resented Grunwald's attempts to come into Lilleberg's ''church'' to ''preach'' Grunwald's ''religion.'' Lilleberg had, in turn, sought to persuade the court that he had been speaking metaphorically to Grunwald, and that Grunwald's lawsuit was just one more extension of the Unions' attempts to harass him into signing a labor agreement.

from the start, and therefore, he gave short shrift to the application from the start.

Based on the foregoing, I find that the General Counsel made a prima facie showing that Lilleberg's early knowledge of Grunwald's IBEW association, joined to Lilleberg's abiding determination to ''not hire union,'' was a motivating factor in Lilleberg's apparent failure even to consider Grunwald's August 11 application once it arrived in the office. Again, the only question remaining is whether or not WestPac carried its *Wright Line* burden of demonstrating that it would not have hired Grunwald even absent Grunwald's IBEW status. And here, the answer is easy: WestPac made no effort to show that nondiscriminatory factors would have resulted in Grunwald's nonhire. Thus, as to its failure to hire Grunwald in the period between August 11 and September 20, before Grunwald submitted his ''overt'' application, WestPac rested simply on its unsuccessful claim that there was no evidence of Lilleberg's early knowledge of Grunwald's IBEW status. And as to its failure to hire Grunwald after he filed the ''overt'' application, WestPac simply argues on brief, as previously noted, that ''Lilleberg, at that point, had a sufficient business justification to not hire Mr. Grunwald.'' But what was this ''business justification?'' This is WestPac's answer on brief:

> With regard to Mike Grunwald, Lilleberg testified that he did not take him seriously as an applicant for employment with WestPac.[77]

It is clear (see last footnote) that WestPac's counsel is referring to Lilleberg's testimony, supra, where what Lilleberg *actually* said was that he ''didn't see [Grunwald] as a bona fide applicant.'' Thus, we are back where we started; for it was Grunwald's known (or ''pre-supposed'' or ''suspected'') IBEW position that admittedly caused Lilleberg in the first instance to doubt Grunwald's bona fides as an applicant, and under established Board law (sec. III, supra) such doubts cannot serve as a defense to an employer's refusal to hire even a paid, full-time employee of a union.

Accordingly, I judge that WestPac has not carried its *Wright Line* burden in the case of Grunwald, and I conclude as a matter of law that when Lilleberg peremptorily ruled out Grunwald as a candidate for hire after he received Grunwald's August 11 application, WestPac refused to hire him and thereby violated Section 8(a)(3), and derivatively, Section 8(a)(1), of the Act.

8. Interrogation and nonhire of Ross Inglis

a. *Facts*[78]

On or about August 11, at the Eagle-Puyallup job, Superintendent Johnston told covert salt Personett that WestPac needed to hire more apprentices, and asked Personett if he knew of anyone who might be interested. Personett was then a member of the Executive Board of Seattle Local 46, although there is no evidence that Johnston knew this as of August 11. The same night, at a Local 46 meeting, Personett asked others present if anyone had a ''kid looking for work.'' A fellow executive board member named Inglis (first name unknown) mentioned that his son, Ross, was looking for work, and Personett urged the senior Inglis to send Ross to the Eagle-Puyallup job to apply.

On August 12, Ross Inglis (Inglis) visited the Eagle-Puyallup site.[79] There, he talked with a man whose name Inglis could not remember, but who wore an orange hard hat. (Johnston effectively admitted that he was the man whom Inglis spoke to, and I so find.[80]) Johnston asked Inglis about his knowledge of the trade, and Inglis replied that he had worked for his father, who was an electrician. Johnston then asked Inglis if he was a union member. Inglis replied that he was not, but that his father was. (More than a year after the event, Johnston still was able to recall from the witness stand that Inglis had ''brought the fact up that his father was in the union,'' but he denied, unconvincingly, that he had questioned Inglis about his own union membership.) Then, as Inglis put it, ''the next thing that came out of [Johnston's] mouth was, Sorry, we don't do hiring on the job site[,]'' following which Johnston directed Inglis to the company's offices in Woodinville, at least 50 miles away. After Inglis left the site, Johnston commented to Personett that Inglis had told him that his father ''works for the union.'' Personett replied that he didn't know this, adding that the last he had heard, Inglis' father was working for a nonunion contractor.

Later, on or about August 25, Inglis completed and submitted an application form to WestPac,[81] but he was never hired; indeed he was never called after his initial jobsite appearance on August 12.

b. *The 8(a)(1) and (3) analyses and conclusions as to Inglis*

Based on findings and reasoning I have already explained in previous analyses, I find that when Johnston asked Inglis on August 12 if he was a union member, he was doing so in furtherance of Lilleberg's declared plan to ''not hire union.'' And I thus conclude as a matter of law that when

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[77] R. Br. 42, citing Lilleberg's July 5, 1994 testimony (Tr. V:560:14–17) in his answers to my questions as just quoted, to the effect that he did not regard Grunwald as a ''bona fide applicant.''

[78] Unless I say otherwise, my findings in this section derive from the credited and mostly undisputed testimony of covert salt Personnet and job applicant Ross Inglis. To the extent that Superintendent Johnston's testimony rather vague testimony about the episodes described below conflicts with that of either Personett or Inglis, I rely on the latter witnesses, who provided convincing detail, and whose demeanor was superior to that of Johnston.

[79] I do not find it necessary to decide whether or not Inglis was truthful when he testified, (a) that he had filed an initial application with WestPac before August 12 (one which, incidentally, WestPac agent Campbell testified she could not find when she made a specific search for it in response to the General Counsel's trial subpoenas); (b) that, sometime before his August 12 visit, he had been assured by someone in WestPac's office that he would be hired at Eagle-Puyallup but first must interview with the superintendent at the site, and (c) that his father had not inspired his visit to the site on August 12.

[80] Johnston admitted that he interviewed Inglis, and there is no doubt that both Johnston and Inglis were referring to the same interview, for Johnston's version closely resembled the version given by Inglis. Separately, Personett confirmed that he saw Johnston, the only WestPac agent on the Eagle-Puyallup site who wore an orange hard hat, take Inglis into the job trailer for an interview, and that he and Johnston had a conversation about Inglis, described infra, after Inglis left the site.

[81] G.C. Exh. 4(f), admittedly found in WestPac's records in response to the General Counsel's trial subpoenas.

Johnston so questioned Inglis, WestPac violated Section 8(a)(1) of the Act, substantially as alleged in paragraph 7(b) of the complaint.

I also conclude that the General Counsel made out a prima facie case that a motivating factor in WestPac's subsequent failure to hire Inglis was his revelation to Johnston of his father's association with the IBEW. There is plain evidence above and below that WestPac was hiring during this period and was at the same time rather systematically screening out applicants suspected of IBEW membership or support. Accordingly, I would find that the inference of unlawful discrimination against Inglis was established, prima facie. The only question remaining for discussion, therefore, is whether WestPac demonstrated that it would not have hired Inglis even absent its knowledge of his father's IBEW membership.

WestPac's attempts to carry this burden were again unpersuasive. Unsurprisingly, WestPac made no attempt to demonstrate that there were no jobs available for Inglis, for the record clearly shows not just that WestPac was advertising for and hiring apprentices and journeymen in this period, but that Johnston had told Personett only the day before Inglis' arrival at the site that WestPac needed to hire more apprentices. Indeed, WestPac's *Wright Line* defense in this case is hard to spot. One defense, apparently, is grounded simply in an attack on an element in the General Counsel's prima facie case; thus, WestPac argues (Br. 40), that Lilleberg, ''who made the hiring decisions,'' was never advised that Inglis' father was a union member. Significantly, however, Lilleberg never directly so testified. Moreover, as noted above, Johnston admitted that Inglis had disclosed his father's IBEW membership during the August 12 interview, and Personett's credited testimony shows that this information was of sufficient interest to Johnston that he immediately shared it with Personett. Thus, it is a fair inference in all the circumstances that Johnston would have likewise shared this knowledge with Lilleberg.[82] Therefore, to the extent that WestPac's defense to the nonhire of Inglis is based on the assertion that Lilleberg himself was not aware of Inglis' father's union membership, I reject it as implausible.

The only other defense I can detect in WestPac's argument is apparently grounded in this claim (id. at 42):

> With regard to . . . Ross Inglis [and two other applicants yet to be considered, James Thompson and John Fraine] the straightforward reason [for their nonhire] was that their applications were placed in an application file and—along with 180 other applications—were never pulled out for additional consideration.

In support of this claim, WestPac cites Transcript XVI:1895:2–7. Remarkably, however, the citation is to a proposed stipulation (eventually received) that ''Mr. Lilleberg would testify that the applications were filed in the locations [where the applicants lived] and he has no recollection as to why the individuals [elsewhere identified as including Inglis, Thompson, and Fraine] were not hired.'' Clearly, the stipulation can provide no support for the above-quoted claim in WestPac's brief; for the essence of the stipulation is that Lilleberg would testify that he *didn't remember why* he had not hired Inglis, among others, and it nowhere provides specific support for the claim that Lilleberg ''never pulled out [the applications of Inglis, et al.] for additional consideration.''

Accordingly, WestPac did not satisfy its *Wright Line* burden, and I conclude as a matter of law that when WestPac failed to consider Inglis for hire after he disclosed his father's union affiliation, it refused to hire him and thereby violated Section 8(a)(3) and (1) of the Act.

9. Nonhires of Aaenson, Allen, and Wright[83]

On August 2, and again on August 3, Local 191's Chapman had visited the Navy-Everett site with several unemployed Local 191 members, among whom on one or both such visits were the following four journeymen, Marty Aaenson, Randy Allen, Wayne Wright, and James (Jimmie) Thompson. All of them wore IBEW logos on their clothing. On the first visit, Chapman asked Superintendent Fitzgerald, who knew that Chapman was a Local 191 agent, for job application forms for the members who accompanied him. Fitzgerald said he didn't have any, but gave Chapman WestPac's telephone number and suggested that Chapman or the jobseekers call the office and ask for applications to be mailed to them. On the second visit, Chapman also asked Project Manager Coers, who likewise knew Chapman's IBEW identity, for applications, but Coers, contrary to Fitzgerald's advice, told Chapman that the only way to get applications would be to ask in person at the Woodinville headquarters.

Despite Coers' obvious attempt to discourage members in Chapman's entourage from filing applications, it is apparent from WestPac's records and/or from Chapman's testimony that the four journeymen—Aaenson, Allen, Wright, and Thompson—each completed and submitted applications to WestPac, and that, by one route or another, WestPac received them. I will return to Thompson's situation later, and in the balance of this section, I will focus on questions uniquely associated with the applications of Aaenson, Allen, and Wright.

WestPac's summary of its records of requests for application forms and of application forms received (R. Exh. 9) shows that Allen and Wright made requests for application forms on August 2, and that Aaenson did so on August 3. However, that same summary indicates that WestPac had no record of ever receiving completed application forms from these three. Moreover, as part of a written stipulation (R. Exh. 8) associated with the summary exhibit, the parties agreed that ''Ms. Campbell would testify that in reviewing the subpoenaed application files, she was unable to find applications'' from the three now in question.

Despite the latter, Chapman credibly testified, and I find, that Aaenson, Allen, and Wright each completed WestPac application forms and gave them to Chapman, who mailed them himself to WestPac, all in ''union envelopes,'' i.e., envelopes bearing a ''union logo [presumably, the IBEW's] and return address.'' Chapman also retained copies of these applications, which were received in evidence as General Counsel's Exhibits 4(b)(b) (Allen), 4(c)(c) (Wright), and

[82] Contrary to WestPac's counsel on brief (id.), Johnston did not ''den[y] . . . advising Steve Lilleberg . . . of the alleged union status'' of Inglis' father.'' Rather, although invited to do so in a trial session held more than a year after the event, Johnston more modestly professed that he did not now ''recall'' having done so.

[83] Here, findings are based on Chapman's uncontradicted testimony unless I say otherwise.

4(d)(d) (Aaenson), and dated, respectively, August 5, 11, and 9. And on the retained copy of Aaenson's application, Chapman had made a note that he had ''mailed'' it to WestPac on ''8/9/93.''

Even if I credited Campbell's stipulated testimony that her eventual search for these three applications failed to turn them up, this would not be enough to rebut the presumption that the applications, once mailed by Chapman, were received by WestPac in due course. For they could have been discarded or lost by WestPac after their receipt and before Campbell made her search, which was not done until after the General Counsel had issued trial subpoenas in 1994. Indeed, that these applications could have been discarded or lost after their receipt is not simply an abstract possibility on this record: For example, although the parties stipulated that alleged discriminatee Shepler completed and submitted an application to WestPac (and an authentic copy of this application was received into evidence without objection), Shepler's application was another which could not be found when Campbell performed her 1994 search for it and others in response to the General Counsel's trial subpoena. Also in this regard, I credit Duncan's undisputed description of an incident she witnessed at an uncertain point in July or August, as follows: Coers was in Lilleberg's office with LaRoche at a time when Lilleberg was not in the office. The two project managers were reviewing a stack of recent applications. Coers ''tossed [one application] aside without respect, like garbage,'' saying that it was a ''union'' application. Coers then explained to a puzzled Duncan that he knew that it was a ''union'' application because the applicant had noted that on his last job he had earned a wage rate of $22.50 per hour—which Coers characterized to Duncan as a ''union scale'' wage rate—whereas the applicant was now willing to work for $17 per hour if hired by WestPac. Especially with this latter example in mind, I judge it likely that when applications from Aaenson, Allen, and Wright arrived at the Woodinville office in envelopes bearing an IBEW logo and Local 191's return address—even plainer indications of the applicants' IBEW association than a mere reference to ''union scale'' wages—they received at least comparably contemptuous and perfunctory handling, and, in all probability, were simply thrown away.

a. *The 8(a)(3) analysis and conclusions as to Aaenson, Allen, and Wright*

My findings to this point foreshadow my obvious judgment that the General Counsel has made a prima facie showing that the three applicants' perceived IBEW association was a motivating factor in WestPac's failure to hire them. WestPac has made little or no attempt to meet its *Wright Line* burden as to Aaenson, Allen, and Wright, i.e., it has not tried to show that it would have failed to hire them for ''innocent'' reasons alone. Rather, on brief, it argues simply (p. 32; emphasis added) that its ''defense to these three discriminatees is that *no application was received from these individuals*.'' I have already found to the contrary, and therefore, this is no defense. WestPac further argues (p. 34), citing the Eighth Circuit's opinion in *Town & Country Electric v. NLRB*, supra, 34 F.3d 625, that ''these three applicants—like the other 26—do not constitute bona fide applicants subject to the protection of the National Labor Relations Act.'' I have already disposed of that defense, too.

Accordingly, with the General Counsel's prima facie case thus unrefuted, I conclude as a matter of law that when WestPac unlawfully refused to hire Aaenson, Allen, and Wright in violation of Section 8(a)(3) and (1).

10. Nonhires of Thompson, Fraine, and Wagster

a. *Facts*

WestPac admittedly received applications from Local 191 journeyman member James (Jimmie) Thompson, and from Local 46 journeyman members John Fraine and David Wagster. It admittedly never hired any of them or called them for interviews after they submitted their applications. These are the details surrounding each applicant and each of their applications:

Wagster: Relying mainly on Wagster, who is corroborated as to matters of surrounding detail by Local 46 agents Freese and Galusha, I find as follows:[84] Freese and Galusha had encouraged the out-of-work Wagster to seek work with WestPac on the Eagle-Puyallup job and to openly disclose his union membership in the process. On the morning of September 1, Wagster came to the Eagle-Puyallup site sporting a red hat bearing the IBEW logo, and had a conversation with Johnston in the job trailer. Wagster told Johnston that he was a Local 46 member and that he had been told by Union Agent Freese that WestPac might be hiring electricians at Eagle-Puyallup. Johnston reminisced that his ''old friend Jim Freese . . . tried to organize me a number of years ago''—an apparent reference to Local 46's attempts to organize the nonunion Telon Electric in the aftermath of the double-breasting of the former Nolet Electric business. At some point Johnston asked Wagster if he knew that WestPac was a ''nonunion shop,'' and Wagster said that he did. At some point, Johnston told Wagster he would have to get an application form from the Woodinville office, but he eventually relented and furnished Wagster with an application from a supply in the job trailer, which Wagster completed, and gave back to Johnston. Johnston, in turn, promptly faxed the application to Woodinville, at approximately 9:42 a.m. Wagster's application truthfully disclosed his previous employment history with IBEW contractors; Wagster also noted on the application that he had received wage rates in excess of $22 per hour on those jobs and that he ''expected'' the same amount as ''minimum hourly wages'' from WestPac. However, some days later, after Wagster told Local 46 agents that he had requested the $22-plus-per-hour rate as his expected wage rate with WestPac, these agents suggested that he ''amend'' this request. As a result, on the morning of September 8, Wagster called WestPac's office and asked to change his requested wage to $16 per hour, and he confirmed this emendation in a letter to WestPac which he mailed the same day and which WestPac thereafter admittedly received.

Thompson: As I have found from Chapman, Thompson was one of the Local 191 members who accompanied Chap-

[84] The central feature of Wagster's testimony is his description of his jobsite conversation on September 1 with Eagle-Puyallup Superintendent Johnston, which Johnston disputed in certain particulars, although he failed to narrate a coherent counterversion of the conversation. Rejecting Johnston's denials as demeanorally unimpressive and contextually implausible, I will rely on Wagster's more credibly rendered and coherent account of the conversation.

man on a visit to the Navy-Everett site on August 2 or 3, decked out in prounion regalia, and seeking job application forms from Fitzgerald and Coers. WestPac's records also show that it received an application dated August 3 from Thompson. (In fact, Thompson's application, G.C. Exh. 4(a), shows on its face that it was transmitted to Woodinville on ''Aug. 03'' from a WestPac fax line at the ''Fred Meyer'' site.) Thompson disclosed on that application his status as a Washington-licensed journeyman, the names of contractors he had recently worked for on commercial jobs—Ewing Electric, and Fletcher Industrial, Inc.,[85] both of which had IBEW contracts—and the $22.50-per-hour-pay rate he had earned on both jobs. Moreover, in the space calling for ''Minimum hourly wage expected,'' Thompson had written, ''$22.90.''

Fraine: From Seattle Local 46 agent Galusha's uncontradicted account, I find that Fraine was another out-of-work Local 46 member whom Galusha had encouraged in August to file an application with WestPac which truthfully disclosed his employment history with IBEW contractors. WestPac records show that Fraine submitted an application dated August 6, identifying himself as a Washington-licensed journeyman who had worked most recently for two named contractors—Dutton Electric, and Electrical Energy Contractors—at hourly pay rates of, respectively, $22.90, and $22.60. However, Fraine had left blank the space for recording what he ''expected'' as a ''minimum hourly wage'' from WestPac.

b. *The 8(a)(3) analyses and conclusions as to Wagster, Thompson, and Fraine*

(1) The ''knowledge'' issue in each case

Wagster's credited testimony clearly establishes that Johnston knew of Wagster's Local 46 membership status when he submitted his application. And in all the circumstances, I would readily impute Johnston's knowledge to Lilleberg himself. However, to find that WestPac knew or believed that applicants Thompson and Fraine were IBEW members, I would have to rely solely on what their applications disclosed—that they had previously worked for named contractors who, in fact, had IBEW labor agreements, and that they had earned wage rates in excess of $22 per hour when they worked for those contractors.

In *Fluor Daniel, Inc*., 304 NLRB 970 (1991), the Board approved the administrative law judge's reliance in part on these indirect indicators of union membership to establish requisite employer knowledge of the ''union'' affiliation of an applicant. However, reliance alone on such indicators has been questioned in other cases, for example, *Dorey Electrical Co*., 312 NLRB 150, 151–152 (1993), and *Tyger Construction Co*., 296 NLRB 29, 37 (1989). For reasons I explain below, I am persuaded that this case is distinguishable from the latter ones and is much closer factually to the situation presented in Fluor Daniel, supra. Moreover, this case has unique features which make it especially likely in my view that WestPac would have suspected from the information on Thompson's and Fraine's applications that they were IBEW-affiliated.

In *Tyger Construction*, supra, the administrative law judge noted that the ''union'' employers listed on employee applications were operating in ''right to work'' states, and the judge, affirmed by the Board, reasoned from this that applicants who listed such prior employers would not necessarily be perceived as likely union members. Id. at 37. That factor is not present in this case. In *Dorey Electric*, supra, the administrative law judge, also affirmed by the Board, distinguished his case from *Fluor Daniel*, supra, on the initial basis that the employer in *Fluor Daniel* had ''defended on grounds that as union organizers they [job applicants] were not bona fide employee applicants, thus implicitly admitting it knew they were union organizers.'' 312 NLRB at 151. Unlike the situation in *Dorey Electric*, we are presented in this case with an ''implicit admission'' by WestPac that is nearly identical to the one in *Fluor Daniel*, i.e., in WestPac's affirmative defense that none of the alleged discriminatees was a bona fide employee. The judge in *Dorey Electric* further noted, in contrast to *Fluor Daniel*, that the respondent-employer was from out-of-state, and its manager ''did not know the local contractors'' whose names had been listed on alleged discriminatees' job applications. 312 NLRB at 151. Here, by contrast, Lilleberg had been operating a series of Seattle-area electrical contracting businesses in western Washington for more than 20 years, and this record shows that he was, to put it gently, a ''union-conscious'' contractor. Thus, even though Lilleberg denied that he knew the ''union'' or ''nonunion'' status of the particular contractors listed on Fraine's and Thompson's applications, I would dismiss such denials as improbable.[86] Finally, in *Dorey Electric*, addressing the listing by some applicants of ''union scale'' pay rates on their applications, the judge found that ''a high previous wage is not really proof of union membership[,]'' because the applicants could have earned such high wages on

[85] The name *Fletcher Industrial, Inc.* was handwritten by Thompson on the form as ''Fletcher Ind. Inc.'' This name has been misrendered as ''Fletcher, Fred Inc.'' on a summary exhibit, G.C. Exh. 43. p. 1, to the left of Thompson's name, but has been correctly rendered on that same exhibit on the next line, opposite the name of ''Dece Kilpatrick,'' another applicant who had listed Fletcher Industrial as a previous employer.

[86] I do so with the following additional facts and considerations in mind: As I elaborate in a later section, job applicant Bert Swift credibly testified (in a passage relied upon by WestPac, Br. 74) that on September 16, Lilleberg reviewed Swift's application and then remarked to Swift that he ''noticed that [Swift] had worked for some union shops.'' In addition, counsel for the General Counsel compiled two summary lists, first, G.C. Exh. 43, listing all the contractors mentioned as prior employers on applications of alleged discriminatees whom WestPac did not hire; and second, G.C. Exh. 44, listing all contractors mentioned as prior employers by applicants of all stripes whom WestPac did hire. Then prosecuting counsel called an ''expert'' in the business, Terry Hooper, the owner of an IBEW-represented electrical contracting firm in the Seattle area, who testified that he recognized all contractors listed on G.C. Exh. 43 as those with IBEW labor agreements. (In this regard, incidentally, Hooper was marginally wrong, for the list on G.C. Exh. 43 included Telon Electric and Thornton Electric, mentioned by nonhired applicant Thornton on his application, even though the record independently establishes that Telon Electric and Thornton Electric were nonunion operations.) Hooper likewise recognized all those listed on G.C. Exh. 44 as nonunion contractors. Moreover, Hooper averred as a fact of business life that anyone of Lilleberg's experience would recognize the same things, because this was the kind of information about his ''competition'' that Lilleberg would have to be aware of in order to decide whether or how much to bid on a given job in the area.

''Davis-Bacon Act'' jobs without being employed by a unionized contractor. 312 NLRB at 152. This latter point is, of course, quite valid, and on the unique facts of that case, I see no reason to take issue with the judge's concluding statement (id.), that ''[w]age rates on an application do not prove much.'' Here, however, the record credibly shows that, to WestPac, ''wage rates'' on a job application ''proved'' rather a lot, especially when they matched up with what the Company knew to be ''union scale'' rates.[87] Accordingly, I am persuaded that the fact of Thompson's and Fraine's prior employment with IBEW contractors, and the fact that they had previously received ''union scale'' pay levels would have been noticed by Lilleberg or his subordinate managers in even a cursory review of the applications, and would have been treated by him or them as indicators of Thompson's and Fraine's likely IBEW membership.

(2) *Wright Line* defenses

With these questions of knowledge behind me, and on a record where WestPac's anitunion animus and its overriding desire to ''not hire union'' is otherwise abundantly clear, I further find that the General Counsel has made out a prima facie case that a motivating factor in WestPac's failure after receiving their applications to interview or hire Wagster, Thompson, and Fraine was their known or presumed IBEW memberships. The only remaining question, therefore, is whether WestPac met its *Wright Line* burden of demonstrating that it would not have hired Wagster, Thompson, or Fraine for nondiscriminatory reasons alone.

WestPac has made no attempt to offer a *Wright Line* defense as to the nonhire of Wagster; rather, it simply argues, based on Johnston's discredited testimony, that WestPac was unaware that Wagster was an IBEW member. I have found to the contrary; therefore, the General Counsel's prima facie case of wrongful discrimination against Wagster stands entirely unrefuted. WestPac's *Wright Line* defense in the cases of Fraine and Thompson is the same one discussed earlier in the case of Inglis, to wit:

> With regard to John Fraine, Ross Inglis, and Jimmy Thompson, the straightforward reason [for their nonhire] was that their applications were placed in an application file and—along with 180 other applications—were never pulled out for additional consideration.
>
> However, I have already noted that, to support this alleged defense, WestPac relies on a trial stipulation concerning Lilleberg's putative testimony in which the parties agreed, in essence, that Lilleberg would testify that he *didn't remember why* he had not hired Fraine, Inglis, and Thompson. I also note that shortly before this stipulation was proposed, Lilleberg, under questioning by WestPac's counsel, had testified with respect to the nonhire of Thompson, that ''I *probably* didn't go through the application.'' This, too, fails to support WestPac's sweeping defensive assertion on brief that the applications of Fraine and Thompson (and Inglis) ''were never pulled-out for additional consideration.'' Thus, where the quoted defense is quite unsupported by the stipulation WestPac invokes or by any credible independent testimony from Lilleberg, I judge that the defense is without merit.[88]

Accordingly, with the General Counsel's prima facie case thus unrefuted, I conclude as a matter of law that when WestPac failed to hire or consider Fraine, Thompson, and Wagster, it violated Section 8(a)(3) and (1) of the Act in each case.

11. Introduction of more detailed application form; Johnston's September 9 statements to Beyer about ''screening''

a. *Facts*

Lilleberg admitted that sometime between ''June'' and ''August,'' he developed and introduced a new, six-page application form into the hiring 0process, which replaced the one-page form previously described. Crediting Duncan's more specific and reliable testimony, I find that Lilleberg began to work up the new form with Duncan's assistance in the second half of August, and that the new form was not completed nor distributed to the various project superintendents until the last week in August or perhaps the first week in September.[89] In a lengthy paragraph on the cover page of the new form, captioned ''Representation and Waivers,'' the applicant was put on notice, inter alia, that, by signing the application, he or she was ''authoriz[ing] the Company to investigate any and all statements contained in this application[,]'' and was ''consent[ing] to the Company conducting any checks on [the applicant's] background which

[87] I refer to Duncan's description, supra, of Coer's contemptuous handling of an application after Coers had deduced from the applicant's ''union scale'' wage rate on his last job that the applicant was ''union.''

[88] Independently, concerning the stipulation in question, it is interesting to note the following later exchange on cross-examination between counsel for the General Counsel and Lilleberg concerning a pretrial affidavit Lilleberg had given to a Board investigator in which Lilleberg had then had no difficulty advancing a reason for his nonhire of *Fraine*, a reason which clearly implicated Thompson, as well. Thus (emphasis added):

> Q. Does that paragraph [at page 28 of Lilleberg's affidavit] read: ''John Fraine applied for work on or about August 6th. He also asked for more than $22 per hour, and this is beyond my wage cap. *I immediately rejected those applications which reflected this high wage demand*.''
>
> A. Uh-huh (affirmative).
>
> Q. Yes?
>
> A. Yes.

Clearly, this out-of-court statement by Lilleberg implies, contrary to the claim now urged by WestPac, that Lilleberg did ''pull-out'' and ''consider'' all applications. Moreover, it appears that, from WestPac's standpoint, the stipulation that Lilleberg would testify that he did not remember why Fraine (and Thompson and Wagster) had not been hired was preferable to the ''reason'' Lilleberg had specifically advanced to the Board in his affidavit as to Fraine.

[89] Superintendent Johnston's recollection that he first got copies of the new forms in late August is roughly consistent with Duncan's account of the timing. Similarly, WestPac's own files of completed applications contain nothing but ''old,'' one-page forms bearing dates before September 2. (Gary Falvey's application dated September 2—G.C. Exh. 3(O)—is the earliest dated example of a departure from the ''old'' form, and it reflects a preliminary version of the ultimate, ''new'' form adopted by Lilleberg. An application filed by Dean Asher dated September 3—G.C. Exh. 3(M)—is the first dated example of the use of the final version of the ''new'' form.)

are deemed necessary, advisable, or helpful by the Company (except contacting [the applicant's] current employer, unless permission is granted above).'' Moreover, the succeeding pages on the new form called for far more detailed information than the old one had sought concerning an applicant's work history, references and qualifications, and Lilleberg admittedly developed and introduced the new form precisely because the old form had proved inadequate in drawing out such details from applicants.

It requires little imagination in the light of the timing and other surrounding circumstances as I have found them to infer that Lilleberg's introduction of the new application form was simply one more element in WestPac's evolving attempts to detect and screen-out job applicants with IBEW affiliations. However, the complaint does not allege that WestPac's introduction of the new form was itself unlawful; rather paragraph 8(d) of the complaint alleges, in substance, that ''in or about early to mid September,'' Eagle-Puyallup superintendent Johnston unlawfully coerced an employee by telling the employee that WestPac was ''screening out applicants for hire who were members of the Union,'' and that the new form was being introduced to aid in this ''screening'' effort.

In support of this count, Eagle-Puyallup employee Tim Beyer testified credibly, in substance, as follows: On or about September 9, Johnston came up to Beyer as Beyer was hanging a fixture and asked Beyer if he knew someone named Walt Russell. Beyer confirmed that Russell was a friend of his. Johnston asked about Russell's background, and Beyer told him what he knew. Eventually, Beyer asked why Johnston was asking about Russell. Johnston replied that Russell and his son had just come to the site and asked Johnston for job applications. Then, as Beyer described it, Johnston elaborated that ''we'd just like to know a little a bit about the employees, trying to screen them a little better. . . . lately we've been getting a lot of [salts] from the union, and we're just trying to screen them . . . matter of fact, we just came out with a new six page application and, you know, [it] goes furthers [sic] in depth on their prior history of work.'' Johnston also told Beyer that he had told Russell to call ''the Woodinville office,'' because ''they no longer hire on the job site.''

Johnston generally denied that he had ever ''advised Mr. Beyer that the longer application was intended to screen out applicants[,]'' and further denied any recollection of ''any conversation about the application form itself with Mr. Beyer.'' Johnston was not asked, however, about a conversation with Beyer concerning Walt Russell or his background; neither was he asked whether he had ever told Beyer that WestPac was ''screening'' applicants more closely because ''lately we've been getting a lot of salts from the union.'' In the circumstances, and judging more generally that Johnston was not candid about his union-related discussions with employees and applicants, I am not persuaded by his partial denials, and I credit Beyer's account, supra, as the more reliable one.

b. *The 8(a)(1) analysis and conclusion*

In substance, Johnston told Beyer that WestPac was screening applicants more closely because the ''union'' had been sending ''a lot of salts'' to its jobs, and that WestPac had changed its hiring practices as part of this screening process, both by using a ''new six page application'' which went into greater ''depth on their prior history of work,'' and by ''no longer hir[ing] on the job site.'' The message that WestPac was attempting more closely to screen out IBEW salts was itself a plainly coercive statement, and the message that application forms and hiring procedures were being changed to help in this screening process merely compounded the violation. I therefore conclude as a matter of law that when Johnston communicated these messages to Beyer, WestPac violated Section 8(a)(1) of the Act.

12. Nonhire of the en masse applicants on September 20 and 27

a. *Facts*

The Unions soon got copies of WestPac's new, six-page application forms. On September 20, at least 14 out-of-work IBEW members (13 journeys and 1 apprentice, Schmele, infra), plus IBEW organizers Grunwald and Walsh, completed these forms at Local 46's Seattle hiring hall and then traveled in carpool convoy to WestPac's Woodinville office, where they submitted the applications to the receptionist, Duncan, under circumstances described further below. Grunwald was the only applicant in this group who had previously submitted an application. On September 27, four more out-of-work IBEW journeymen did essentially the same thing. So far as this record shows, none of these 20 applicants ever heard anything more from WestPac after they submitted their applications. For clarity's sake, I list next the applicants on each occasion who are alleged to have been victims of hiring discrimination by WestPac:[90]

September 20 Applicants (16)

Richard Day	David Ray McLellan
Dennis William Dean	Jeffery Miller
Wilson Edwards	James Rush Jr.
Michael Grunwald (2d appl.)	Richard Duane Sage
Lars Be Hansson	Steven Carl Schmele
Robert Francis Holihan	John Walsh
Daniel Kafton	Robert Waters
DeceVene (Pat) Kilpatrick	Steve M. Windley

September 27 Applicants (4)

Perrilee Ann Miller	Dean E. Rhodes
Brett Michael Olson	Michael Wayne Survell

Upon the arrival of the 16 applicants at the Woodinville office on September 20, they entered the office in consecutive groups of two or three, and submitted the applications they had previously completed at the Local 46 hall.[91]

[90] The full names set forth on the lists below are rendered and spelled as they were rendered and spelled by the applicants themselves on their employment applications. In some cases, the names and spellings on these lists are at minor variance with the General Counsel's references to these same applicants in the complaint, or in certain of the General Counsel's summary exhibits, or in the prosecution brief.

[91] For all findings concerning the events surrounding the submission of the September 20 applications, I rely on Local 76 agent,

Grunwald was in the first such group. As I have previously found, Grunwald had filed a ''covert'' application in August; however his September 20 application candidly disclosed his own position as a Local 76 organizer, and Lilleberg was admittedly aware of Grunwald's IBEW status when Grunwald made a follow-up call to Lilleberg on September 23; indeed, as I have found, it was then that Lilleberg said to Grunwald, inter alia, that he was ''looking for electricians willing to work, and . . . not looking for electricians that were there only to stir up bullshit.'' Most of the 16 applicants on September 20 (counting Grunwald) were wearing clothes and/or buttons bearing the IBEW logo; many of them had made explicit references on their applications to their IBEW affiliations, such as by naming one of the Unions or their agents as ''references''; and all of them had disclosed previous employment with IBEW contractors, at wages in the $22-per-hour range known by WestPac to be ''union scale.''

A similar pattern was repeated when the four additional IBEW journeys submitted applications on September 27.[92] Moreover, all of these September 27 applicants had unmistakably identified themselves in nearly identical ways on their applications as persons affiliated with the Unions' ''organizing'' efforts. Thus, Perrilee Miller and Michael Survell had written ''Organizing Dept. IBEW Local 46'' in the ''Referred by'' box on the new WestPac form. Similarly, Brett Olson had written ''Local 46 Organizing'' in the same box, and Dean Rhodes had written ''IBEW Org. Comm.''

Lilleberg was apparently not in the office during either of these group application appearances, and he vaguely claimed not to have been aware that the applications submitted at Woodinville on September 20 and 27 were from IBEW members. (As in many other instances, however, Lilleberg here was slippery and equivocal, for he also vaguely acknowledged that he was aware that many of the applications he had received in ''late September'' were from persons who openly acknowledged their interest in ''organizing'' WestPac's workers.) Lilleberg's predictable equivocations aside, Duncan testified plainly and without contradiction—and I find—that she took the applications thus submitted on each date (which she referred to as ''union'' applications) and on each date placed them in a stack on Lilleberg's desk, for his later review. Moreover, Duncan testified, and I find, that these two, en masse visits by overt salt applicants in September were recognized by everyone in the office as ''union'' inspired. In those circumstances, and considering every other finding I have made to this point, I deem it nearly inconceivable that Lilleberg would not have been advised by someone in the office that the applications placed in a stack on his desk from the 20 applicants now in question were ''union'' applications. Accordingly, wholly apart from the fact that the applications themselves contained either explicit or implicit references to the IBEW affiliation of each applicant, I find that Lilleberg and other WestPac agents knew or believed from the circumstances of their submission alone that the 20 applicants were IBEW members with an interest in aiding the Unions' organizing campaign if hired. See, e.g., *AJS Electric*, supra, 310 NLRB at 121.

b. *The 8(a)(3) analyses and conclusions of law regarding the September 20 and 27 applicants*

For reasons which should be largely apparent from all my previous findings, I judge that the General Counsel has established a prima facie case that a motivating factor in WestPac's failure to hire or consider for hire all 20 applicants listed above was their apparent association with the Unions and the Unions' organizing effort. Apart from arguments based on the Eighth Circuit's opinion in *Town & Country Electric*, supra, 34 F.3d 625, WestPac argues here, as in other instances, that the evidence does not establish the knowledge element. I have found, on the contrary, that the knowledge element is well established as to each of the 20 applicants. Thus, to escape liability for a finding that it violated Section 8(a)(3) by refusing to hire those 20, it became WestPac's burden to demonstrate that it would not have hired any or all of them in any nondiscriminatory case. After studying WestPac's arguments closely, it appears that here, as in many other cases earlier, WestPac again relies on Lilleberg's own quite indistinct attempts to suggest that he simply ''filed'' these applications without paying much attention to them, just as he vaguely claims to have done with many other applications submitted by persons with no obvious IBEW connection. For reasons I have thoroughly discussed already, however, such a generalized defense suffers not just from Lilleberg's vagueness in advancing it, and from WestPac's failure to furnish any documentary corroboration for it, but from a more fundamental lack of plausibility, especially given the abundance of evidence that Lilleberg was otherwise searching near (''for [current employees'] brothers or neighbors or . . . friends or high school buddies . . . to try to find non-union people and make it a family business'') and far (Riverside County, California) to fill jobs that continued to arise throughout September and thereafter.

Accordingly, I conclude as a matter of law that when WestPac ''filed'' and thereafter ''forgot'' the applications of the 20 IBEW-member jobseekers on September 20 and 27, it refused to hire them and thereby violated Section 8(a)(3) and (1).

F. *The Strikes; WestPac's Treatment of the Strikers*

1. Introduction; WestPac's ''intermittent strike'' defense

In this section I deal centrally with WestPac's reactions to three distinct strike events occurring over a roughly 2-week period: In the first one, the August 30 strike, six Meyer-Bur-

Grunwald's, and Local 46 agents, Galusha's and Freese's, essentially harmonious and undisputed accounts.

[92] Here, I rely principally on Local 76 agent, Galusha's, description of the background events at the Local 76 hall leading to these September 27 ''follow-up'' applications, and on applicant Brett Olson's descriptions of what happened when the applications were submitted at Woodinville. I give little weight to the conclusionary descriptions and characterizations of these events advanced by another September 27 applicant, Henry West, except insofar as his testimony tends to echo that of Olson or Galusha. In this regard, moreover, I note that West was called as WestPac's witness in an effort to establish that none of the the September 27 applicants genuinely intended to take work at WestPac in the event they were hired. However, the most that West's testimony shows is that West himself had no genuine wish to become employed by WestPac—indeed, that he was physically unable to go to work at the time due to serious injury. And it was with these considerations in mind, and for reasons I more fully explained on the September 15, 1994 trial record, that I granted the General Counsel's motion to amend par. 13(f) of the complaint by deleting West's name from the list of alleged discriminatees named therein.

lington electricians with concededly economic aims walked off the job and picketed for less than 3 hours before they offered unconditionally to return. They were permitted to return the following morning. The second strike, begun on September 3, involved the same six, recently reinstated former strikers, and was soon joined by two more WestPac workers from the Texaco-Anacortes site; it was assertedly conducted in protest of WestPac's allegedly unlawful discriminations against the six returning August 30 strikers; it ended on September 7, again with unconditional offers to return. The two strikers from the Texaco site were permitted to return to that site on September 9. Of the six strikers from the Meyer-Burlington site, one was permitted to return to that site, but not until September 9; four others were ordered to report to the Texaco-Anacortes site on September 9; one more was denied reinstatement on the ground he had been permanently replaced. The third, and final strike (which the General Counsel prefers to label a continuation of the second strike) began on September 9 and ended on September 16, when the five participants (all of them participants in the earlier strikes) again made unconditional offers to return; it was again assertedly begun in protest of WestPac's alleged unfair labor practices, particularly its failure to reinstate four of the second-strike participants to the Meyer-Burlington job and its transfer of them instead to the Texaco-Anacortes job.

Apart from more particularized defenses to its alleged unfair labor practices associated with the strikes, WestPac argues that the three strikes summarized above are properly seen as a coordinated series of statutorily unprotected, ''intermittent'' strikes, and because of this, WestPac reasons that it could lawfully punish the strikers as it saw fit for their unprotected conduct. For reasons which may be more apparent in the light of my more detailed findings and analyses, infra, I find no merit to WestPac's intermittent strike defense. Although the foregoing summary of the strikes may superficially suggest the ''intermittent'' characterization urged by WestPac, we must recall that the ''mere fact that some employees may have struck more than once does not render their conduct intermittent striking.'' *United States Service Industries*, 315 NLRB 285 (1994), and authorities cited.[93] I can find no substantial support in the record for the notion that these strikes were conducted in furtherance of a single, underlying plan or scheme by the Unions or the strikers to use ''hit and run'' tactics intended to ''harass the company into a state of confusion.'' *United States Service Industries*, supra at 285. Neither could I find on this record that the strikes were intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement. See, e.g., *John S. Swift Co*., 124 NLRB 394, 396 (1959), enfd. 277 F.2d 641 (7th Cir. 1960); *First National Bank of Omaha*, 171 NLRB 1145 (1968), enfd. 413 F.2d 921 (8th Cir. 1969); and *Audubon Health Care Center*, 268 NLRB 135 (1983). Rather, based on details noted elsewhere below, I judge that each strike was ''unique to its facts and circumstances,''[94] i.e., that each strike had its distinct origins and motivating antecedent features. Specifically, I judge that WestPac's unlawful discriminations against returnees from the first strike was an important factor in the employees' decisions to begin the second strike, and WestPac's further discriminations against returnees or would-be returnees from the second strike became, in turn, an important cause of the third strike.

Accordingly, having rejected WestPac's intermittent strike defense, I will assume for further purposes of analysis that the participants in each of the strikes enjoyed the full panoply of protections and insulations accorded to strikers under the Act.

2. August 30 strike

a. *Facts*

As of August 30, WestPac had 14 nonsupervisory electricians working at the Meyer-Burlington (Burlington) site, plus Superintendent Engel, and his job foreman or leadman, John T. (Tom) Hollinger.[95] WestPac was admittedly then struggling under heavy pressure to complete the electrical work before the scheduled store opening in the first week of October. As part of its beefing-up of the Burlington crew to meet the completion deadline, WestPac had unwittingly hired Local 191 journey-members Jim Shepler on August 5,[96] Jim Martin on August 6, and Mike Russell on August 23. In addition, by August 30, Mike Russell's brother, Matt Russell, had been put to work at Burlington as a ''green apprentice'' or ''trainee,'' based simply on Mike Russell's recommendation of him to Lilleberg, and without having been asked to complete an application form. Other electricians at Burlington as of August 30 included a late-stage apprentice, Gregg Blackwell, and a journeyman, Dave Bonnickson. Blackwell, who was not an IBEW member, had been working at Burlington since his hire in late March, and had worked on the pretilt-up phase. Bonnickson had been hired on August 5 (following an unlawfully coercive interrogation by LaRoche, supra); he became a member of Local 191 in early September. Until August 30, these six named workers,

[93] Relatedly, it is clear from Chapman's and the various strikers' accounts, infra, that Chapman played a close advisory role throughout the period of the three strikes, and thus it is reasonable to find that the strikers and Local 191 were acting to a significant degree in concert. However, the record falls short of demonstrating that Chapman was ''orchestrating'' these events, in the sense of exercising ''control'' over the strikers' decisions and behavior. Thus, there is no evidence that Chapman ''instructed'' the six workers as to how to proceed, much less that he used any threats of union discipline to shape the decisions or behavior of any of the strikers. Accordingly, I will not need to decide whether, if Chapman were indeed ''directing'' the strikers behavior, this would suffice to render their strikes unprotected.

[94] *Chelsea Homes*, 298 NLRB 813, 831 (1990).

[95] In so finding, I note Engel's testimony that, when six of the Burlington crew ''walked out [on August 30], I lost six out of fourteen people, which is a pretty good percentage of my crew.'' I note further that this total matches daily hours records shown on G.C. Exh. 46 for Burlington workers during the week beginning Monday, August 30. And see chart below, showing daily hours worked by those same 14 nonsupervisory electricians from Monday, August 30, through Thursday, September 2.

[96] For roughly the first three weeks after his hire, Shepler had been assigned to the Texaco-Anacortes site. Shepler and LaRoche agree, however, that Shepler took the Texaco work only after LaRoche agreed to pay him $20 per hour, and only after LaRoche promised that this assignment would last no more than 3 weeks, and that Shepler would then be transferred back to Meyer-Burlington.

like most or all of the eight others, had been working a regular, Monday through Friday work schedule, starting at 7 a.m. and ending at 3:30 p.m. each day.

In the late morning of Monday, August 30, the six employees named above—Shepler, Mike Russell, Matt Russell, Martin, Bonnickson, and Blackwell—walked off the Burlington job, and by about Noon, began to picket at that jobsite in aid of demands for pay rates equal to that being received by IBEW-represented workers for another electrical subcontractor at that site, Cochran Electric. The six strikers stopped picketing at some point between 2 and 2:30 p.m., and then commonly voiced unconditional offers to return to work to Engel, which Engel deflected by instructing the six to communicate their offers directly to Lilleberg. Shepler eventually reached Lilleberg by phone at a point between 3 and 3:30 p.m., and communicated his offer to return, but Lilleberg said he would ''have to think about it[,]'' and was thereafter ''unavailable'' when other strikers tried to communicate to him their own offers to return. Lilleberg nevertheless knew from Engel that all of the strikers had offered to return, and he eventually called each of them at home later the same evening and told them to report to the Burlington site the next day at 7 a.m. The nonstrikers worked an extra hour on August 30, i.e., until 4:30 p.m., and the nonstrikers reported to work on August 31 at 6 a.m., all based on Engel's instructions. Thus, it was that when the six returning strikers appeared on the jobsite shortly before 7 a.m. the next morning, they found that the nonstrikers had already removed their tools and equipment from the jobsite gangbox and were already working. I set forth below some of the interstitial details, which, unless I note otherwise, are likewise undisputed.

Shepler and the other five strikers had met at Shepler's home before work started on August 30, and Local 191's Chapman attended this meeting, as well. In close consultation with Chapman, the workers decided that they would try to get the other WestPac electricians at Burlington to join them in a demand for pay parity with the Cochran electricians on the same site, who were working under an IBEW labor agreement. As a tactic, they agreed they would first stage a conversation in the presence of the other WestPac electricians where they would each compare their respective wage rates, and thus reveal to the other electricians that some were getting paid more than others. During this meeting, the six also discussed the ''options'' available to them if WestPac were to deny their demands, one of which was that they might walk off the job in protest, an option which Chapman assured them they had a ''right'' to exercise, and which WestPac could not fire them for exercising.

During the midmorning break, as planned, the six workers began to discuss wage rates in the presence of other WestPac electricians, including journeyman Ferris. Shepler revealed that he was getting $20 per hour; Mike Russell, feigning surprise, reported that he was being paid $18 per hour, and Martin, in turn, disclosed that he was only getting $17 per hour. Then Matt Russell, the ''green apprentice,'' noted that he was only earning $8 per hour. These staged discussions triggered little or no response from the others, however, and eventually, Shepler was forced to break the conversational lull by asking Ferris what he was earning. Ferris retorted angrily that it was none of Shepler's business, and the lull resumed.

Having failed to arouse the other workers, the six then marched to Engel's office in a group, where Shepler acted as their spokesman. After Shepler told Engel that the six wanted pay parity with the Cochran electricians, Engel got on the phone and called Lilleberg in the presence of the six and reported their demands. Consistent with Shepler's account, Engel admitted that after calling Lilleberg, he told the six that Lilleberg's position was that the job ''isn't bid union,'' and that they had, ''basically two choices: You go back to work for the wages you agreed to, or you resign,'' whereupon, as Engel recalled it,

> Jim Shepler said at that point, ['']No, we have a third option; that is to protest; we are now officially on protest.[''] And the group turned around and walked out. . . . After they walked out I called back to Steve and told him that the six of them had walked away. . . . He said that if they do come back, to have them contact him.

The six then left the jobsite and returned to Shepler's home, where, aided by Chapman, they cobbled together some picket signs from supplies Chapman had brought in his car. The signs bore generalized legends of protest, such as ''WestPac Unfair.'' Chapman and the six protesters then returned to the Burlington site, apparently around Noon, where the six began to picket at the site perimeter, with Chapman in their ranks.

Engel admitted during examination by WestPac's counsel that, ''[w]hen [the strikers] first walked out . . . we decided we were going to work an extra hour that day[,]'' and that he ''advised the [nonstriking crew of that [decision].'' He explained on cross-examination that this overtime work was ordered because the job was already behind schedule, and WestPac was falling further behind as a result of the strike. He also admittedly decided, apparently at the same time and for the same reasons, to require the nonstriking crew members to start work the next morning at 6 a.m. Moreover, after first trying to suggest that he alone made such decisions, Engel soon conceded that ''overtime is something that needs to go through the channels[,]'' and that he ''would have told Steve . . . we would be working on overtime.''

Sometime between 2 and 2:30 p.m., the six strikers conferred with Chapman; they observed that their strike had failed to persuade WestPac to meet their pay demands or to induce any sympathetic reactions from employees still working at the site. Chapman counseled that the six faced an increasing risk of being replaced if they remained on strike, and that they now had only two practical options, either to return to work on WestPac's terms or to quit. The six opted to return to work, and with Shepler in the lead, they walked onto the site, met Engel outside his trailer office, and announced, using words Chapman had advised them to use, that they were ''unconditionally offer[ing] to return to work.'' Engel, who admits that this transaction occurred, also admits that he replied to the strikers' offer by instructing them to call Lilleberg directly. Further, crediting Shepler's uncontradicted account on this point, I find that Shepler asked to use Engel's jobsite telephone to call Lilleberg, but that Engel refused this request, and then gave the strikers Lilleberg's phone number. It further appears that Engel wanted to use the jobsite phone himself to pass on the latest development to Woodinville. Thus, asked by WestPac's coun-

sel, ''Did you contact Steve Lilleberg after that discussion?,'' Engel replied, ''I had tried—and I called—I don't recall if I talked to Steve or not. I did call the office.''

Having been denied the use of the jobsite phone to communicate their offers to Lilleberg, the six would-be returnees then traveled with Chapman to Local 191's satellite office in nearby Mount Vernon, where, sometime between 3 and 3:30 p.m. (Shepler's rough estimate), Shepler called Lilleberg. Crediting Shepler, whose account is not materially contradicted by Lilleberg, I find that Shepler said, ''We offer to return to work.'' Lilleberg replied that he ''would have to think about it,'' and this conversation soon ended. The other five strikers then each placed calls to the Woodinville office, but each was told by the receptionist (presumed to be Duncan) that he was not ''available,'' whereupon each of the remaining strikers told the receptionist that they were unconditionally offering to return, and asked her to give that message to Lilleberg. Relatedly, Duncan credibly testified, and I find, that Lilleberg ''gave me an order not to put through any phone calls from strikers. He didn't want to talk to them,'' and then explained to Duncan that he ''wanted to make it hard for them,'' and that ''he wanted to lay them off.'' Although Duncan did not identify the timing of this episode, Lilleberg did not dispute her account, which I rely on as the real explanation for Lilleberg's ''unavailability'' when each of the five strikers after Shepler tried to reach him by phone (and, the real explanation, as well, for Lilleberg's similar ''unavailability'' when would-be returnees from the second and third strikes, infra, sought to communicate offers to return to him).

After Shepler successfully communicated to Lilleberg his own offer to return, and after the other strikers had left the same messages at the Woodinville office, the six returned to the Burlington site and again talked to Engel. (The timing of their return is uncertain; I infer from Shepler's timing of his call to Lilleberg from Mount Vernon, and from the proximity of Mount Vernon to Burlington, that they would have returned to the Burlington site sometime between 3:15 and 3:45 p.m.) According to Shepler and Mike Russell, Engel then told the six that WestPac was ''in the process of replacing'' them, and that two such replacements ''were going to be there first thing in the morning, and that the rest of them would be there as soon as possible.'' Engel, recalling the return visit, was asked rather vaguely by WestPac's counsel, ''Did you mention at all replacements?'' He replied, ''I do not believe I did.'' His denial, such as it was, struck me as strained and uncomfortable, and I give it no weight; rather, I credit Shepler and Mike Russell that Engel told the would-be returnees they were being replaced.

Word of the August 30 strike had quickly reached superintendents at other WestPac jobsites. The first to receive this news, apparently, was Superintendent T. J. Nelson, at the Texaco-Anacortes (Texaco) site, located about 20 miles west of Burlington, on a narrow peninsula extending into Puget Sound. Thus, crediting WestPac/Texaco workers Danny White and Mike Hill (and especially White as to the timing), I find that during an August 30 lunchbreak at the Texaco site, Nelson approached a group of WestPac employees and asked if any of them were on the ''organizing committee.'' When the workers expressed puzzlement, Nelson explained that some electricians were striking at Burlington, and commented that Shepler was the apparent ringleader, and, if so, that WestPac ''should just get rid of him.''[97] In addition, crediting Personett's undisputed testimony, I find that at about 2:45 p.m. on August 30 at the Eagle-Puyallup site (located nearly 100 miles south of Burlington), Superintendent Johnston told Personett that ''six guys had drug up'' or ''quit'' at Burlington, and that, as a consequence, WestPac was ''looking for people to replace them.'' And in this connection, Johnston again asked Personett to refer anyone he knew who might be interested in such replacement work. Also, crediting Ken Jennings, who was then working on a WestPac job for Northwest Metals in Fife, Pierce County (also about 100 miles south of Burlington), I find as follows: On August 31, Ken Jennings asked his superintendent, Adam Chrisman, about a report he had heard on the evening of August 30 from his brother, Dave Jennings, that electricians at Burlington had walked off the job. Chrisman confirmed this, and also told Ken Jennings that these strikers would be ''let go'' or ''fired,'' and that ''if the employees were to ever vote to go union, we'd be just voting ourselves out of a job because . . . there's no way that Steve would have let the company go union. He would have just closed the doors down first.''[98]

While I think that the timing and sequence of the foregoing events are rather obvious from my portrayals thus far, I note that WestPac's brief, relying on Lilleberg's testimony, advances a quite different version of these matters. First in this regard, WestPac avers as fact that when Lilleberg learned from Engel that the strikers had offered to return, he promptly instructed Engel to ''put 'em back to work.''[99] Second, explaining Lilleberg's eventual instruction to the returnees to report for work the next day at 7 a.m., rather than at 6 a.m., when the rest of the crew was to show up, WestPac relies on Lilleberg's claim that he was unaware that Engel had ordered the nonstrikers to begin at 6 a.m. For reasons elaborated below, I find that in both instances, Lilleberg was untruthful. I find instead that, after he learned (at about 2:30 p.m.) of the strikers' offer to return, Lilleberg effectively rejected those offers and instead toyed for several hours with the idea of simply ''replacing'' them with new hires or others; I further find that when Lilleberg much later decided (presumably, upon advice of counsel) to allow the strikers to return, he already knew that the nonstrikers had been instructed to come in at 6 a.m. the next morning.

Lilleberg's claim that he promptly ordered Engel to put the strikers back to work when he learned they had offered

[97] Questioned about this incident, Nelson said with apparent discomfort that he ''doubt[ed]'' that he had made any ''statements to employees at Texaco-Anacortes about the strike,'' and did not ''recall'' asking anyone if they were on the organizing committee. He also claimed not to ''recall'' making any statement about Shepler's role in the strike, or that Shepler should be fired. I give no weight to these essentially equivocal ''denials.''

[98] Chrisman, like Johnston, would only say that he did not ''recall'' making any such remarks to Ken Jennings. Again, I found his ''denials,'' such as they were, to be unconvincing, and I give them no weight.

[99] WestPac invokes Lilleberg's account of the sequence of things which, in substance was as follows: When he first learned from Engel that the strike had begun (which information, I find from Engel's account, Lilleberg learned immediately upon the noon walkout) he then ''called counsel,'' then called Engel back, then learned from Engel that the strikers were offering to return, and at that point instructed Engel to ''put 'em back to work.''

to return collides with Engel's own account. Thus, although Engel was not sure that he had directly advised Lilleberg as soon as he received the strikers' offer to return (which occurred no later than 2:30 p.m.), he had no doubt, at least, that he had ''call[ed] the office'' with this news; and I must assume that this news reached Lilleberg's ears soon thereafter. (Lilleberg was in the office at the time, and was admittedly in frequent telephone contact with Engel and with his own attorney, Lees, regarding strike developments that day.) In addition, I have found that Superintendent Johnston told Personett at about 2:45 p.m. on August 30 that WestPac needed to hire electricians to ''replace'' the six strikers at Burlington, and solicited Personett's aid in helping to locate candidates for such replacement work. In addition, I have found that when Shepler managed to get through to Lilleberg by phone between 3 and 3:30 p.m. and then repeated his offer to return, Lilleberg stalled by saying he would ''have to think about it,'' then made himself ''unavailable'' when the other strikers tried to reach him by phone. Moreover, in the light of my finding that Engel had told returning strikers sometime between 3:15 and 3:45 p.m. that they were being ''replaced,'' and that two such replacements would be arriving the next morning, it is evident that, as far as Engel then knew, Lilleberg was still bent on replacing the strikers, despite the facts that, (a) Lilleberg already knew that the strikers had offered to return, (b) their jobs were still vacant, and (c) Engel, already behind schedule at Burlington even before the strike, had an even more desperate need to make up for the lost work that the strike had occasioned. Further, it is clear from Engel's testimony that Lilleberg did not abandon his plan to replace the strikers until sometime after 4:30 p.m., more than two hours after the strikers had offered to return. Thus, Engel testified that it was not until ''probably between 4:30 and 5 o'clock,'' in the last of several conversations with Lilleberg that day, that Lilleberg told Engel that the strikers would be coming back, and that he should put them to work the next morning. Finally, Shepler's testimony shows that Lilleberg himself admitted, during his call to Shepler at about 6 p.m. that evening, that the decision to allow the strikers to return had not been made quickly, but only ''[a]fter much discussion and deliberation.''

As to Lilleberg's alleged ignorance that nonstrikers had been told to start work at 6 a.m. on the morning of August 31, this again cannot be squared with Engel's account. As I have found, Engel conceded that such ''overtime'' scheduling had to be cleared ''through channels,'' and that he ''would have told Steve . . . we would be working on overtime.'' Thus, it is more than merely probable on this record that Engel would have told Lilleberg about his next day's early start plan; indeed, on this record, he must have so advised Lilleberg sometime before or during their final conversation that day, which, according to Engel, occurred ''probably between 4:30 and 5 o'clock,'' and during which Lilleberg told Engel that if the strikers showed up the next morning, Engel should permit them to work.

b. *Analyses and conclusions regarding August 30 events*

(1) Nelson's and Chrisman's statements

Consistent with the allegations in complaint paragraphs 7(c) and 9, and using reasoning I have exposed earlier, I conclude as a matter of law that when Nelson asked Texaco site employees during their lunchbreak on August 30 if any of them were on the ''organizing committee,'' and then opined that Shepler should be fired for his leading role in the August 30 strike, WestPac in each instance violated Section 8(a)(1) of the Act. Consistent with amended complaint paragraph 7(g), and with previous reasoning, I conclude as a matter of law that when Superintendent Chrisman told Ken Jennings at Fife on August 31 that the strikers would be ''let go,'' or ''fired,'' and that if the employees ever voted to ''go union'' they would be ''voting themselves out of a job,'' because Lilleberg would sooner ''close the doors'' than ''go union,'' WestPac in each instance violated Section 8(a)(1) of the Act.

(2) Engel's ''replacement'' message; delayed reinstatement of returnees

Paragraphs 5(a) through (c) and 14 of the complaint allege in the aggregate that the August 30 strike involved both ''union'' activity and ''concerted'' activity for employees' ''mutual aid and protection,'' that under either such characterization, the strike was protected by Section 7 of the Act, and that WestPac ''committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act'' when Engel falsely told the returnees on August 30 that they were being replaced, and when WestPac did not reinstate them until the morning of August 31. On brief, the General Counsel makes both distinct and overlapping contentions regarding these counts. Thus, using arguments rooted mainly in the teachings of *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), the General Counsel contends that WestPac independently violated both Section 8(a)(1) and (3) when it did not immediately reinstate the strikers upon their offers to return, but instead delayed their reinstatement until 7 a.m. on August 31. In addition the General Counsel argues that Engel's false ''replacement'' statements to the returnees independently violated Section 8(a)(1), but does not argue that these statements implicated Section 8(a)(3). WestPac denies all such counts. For reasons noted next, I find merit to each of the General Counsel's contentions:

WestPac does not seek to defend the legality of Engel's statement to returning strikers on August 30 that they were being replaced. Rather, WestPac merely urges, contrary to my findings, that Engel did not make such a statement. I have found that when Engel made this statement in the late afternoon of August 30, Lilleberg was still toying with the idea of replacing the strikers; but it is clear that he had not, in fact, replaced them at that point, and that he eventually abandoned the idea and decided instead to permit the strikers to return the next morning. In these circumstances, Engel's statement that the would-be returnees were being replaced was clearly a false one, even if Engel believed that it was then true and even if it was then roughly true as a statement of Lilleberg's *intentions* of the moment. Under the Board's reasoning in *American Linen Supply Co.*, 297 NLRB 137 (1989), Engel's false statement was an unlawfully coercive one. Thus, in *American Linen*, the Board affirmed the administrative law judge's findings that the respondent-employer, who had communicated a similarly false ''replacement'' message to strikers, had ''both threatened strikers with discharge for striking and thereafter effectively discharged

them.''[100] In affirming the judge, the Board relied on *Mars Sales & Equipment Co*., 242 NLRB 1097, 1101, 1102 (1979), enfd. in pertinent part 626 F.2d 567, 572–573 (7th Cir. 1980), and *W. C. McQuaid, Inc*., 237 NLRB 177, 179 (1978), enfd. on other grounds 617 F.2d 349 (3d Cir. 1980). The *American Linen* board construed those cases as holding that ''an employer who informed lawful economic strikers that they had been permanently replaced when in fact the employer had not obtained such replacements, had thereby terminated the strikers in violation of Section 8(a)(3) and (1).'' 297 NLRB at 137. The *American Linen* board also said this (id.; emphasis added):

> Although an employer has the right under *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), to permanently replace economic strikers, this right does not extend to withholding from them the right to return to their *unoccupied* jobs simply because they have gone out on strike. A *false* statement that permanent replacements have been obtained accomplishes this unlawful end. *NLRB v. Mars Sales & Equipment Co*., . . . 626 F.2d at 573 [(7th Cir. 1980)].

I recognize that Engel did not say that the strikers were being permanently replaced, but in the circumstances, I don't think his failure to utter that magic word cures the coercive quality of his false statement. For it is clear that he made this statement to justify WestPac's refusal at that point to reinstate the would-be returnees to their still-unoccupied jobs, a refusal which would only have been lawful in the circumstances if, indeed, WestPac had permanently replaced the strikers. I also recognize that Engel's replacement statement was eventually contradicted by Lilleberg some hours later, when Lilleberg told the returnees that they could resume work at 7 a.m. the next morning. And this may insulate WestPac from any claim under *American Linen* that Engel's statement amounted ''effectively'' to an unlawful ''termination'' of the strikers, a claim which the General Counsel does not distinctly make in any case. However, this fact would not appear to detract from the unlawfully coercive impact under Section 8(a)(1) of Engel's replacement statement insofar as it carried the false message that the strikers were barred from reinstatement because they had been replaced. Accordingly, relying on the reasoning of *American Linen*, I conclude as a matter of law that when Engel falsely told the would-be returnees they were being replaced, WestPac violated Section 8(a)(1).

I also agree with the General Counsel that WestPac unlawfully discriminated against the returning strikers or otherwise interfered with their Section 7 rights when it did not reinstate them immediately upon their offers to return at approximately 2:30 p.m. on August 30. In *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967), the Supreme Court pronounced the pertinent rule of law:

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act. . . . Under § 8(a) (1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights Accordingly, unless the employer who refuses to reinstate strikers can show that his actions were due to ''legitimate and substantial business justifications,'' he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. [Id.]

As the Board noted in American Linen, supra, ''permanent replacement'' of a striker is one such ''legitimate and substantial'' justification for refusing to reinstate a striker who has unconditionally offered to return. So, too, is the employer's bona fide ''elimination'' of a striker's job during the strike. *NLRB v. Fleetwood Trailer*, supra, 389 U.S. at 379. See also, e.g., *NLRB v. Transport Co. of Texas*, 438 F.2d 258, 264 (5th Cir. 1971).

WestPac has not claimed, much less proved, that it had either permanently replaced any August 30 striker or eliminated any of their jobs at the time they offered to return to work. And under *American Linen*, supra, WestPac had no right ''to withhold from [the returnees] the right to return to their *unoccupied* jobs simply because they have gone out on strike.'' Yet such a punitive withholding appears to be precisely what WestPac did when, without uttering any reason other than a false one, it did not permit them immediately to return for the remaining two hours of work still available on August 30, but delayed their reinstatement until the next morning. Finally, the punitive character of WestPac's delays in reinstatement was made even more evident when the strikers reported at 7 a.m. on August 31 and soon learned that the nonstrikers had been on the job since 6 a.m. Thus, in all the circumstances, I judge that WestPac's refusal to reinstate the would-be returnees for the balance of the afternoon shift on August 30, and its eventual instructions to them to report to work on August 31 an hour later than the rest of the crew, were ''inherently destructive'' of important employee rights, and were in any case unleavened by any legitimate business justification which might otherwise require the ''balancing'' of competing rights and interests. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967).

Arguing to the contrary, WestPac correctly notes that when the Board finds that an employer has unlawfully denied reinstatement to strikers who have unconditionally offered to return, and thus orders the employer to give them backpay until they are offered reinstatement, the backpay period does not run from the date of the strikers' offer to return, but instead assumes that a ''5-day'' period would have elapsed before the employer, acting lawfully, would have been able to effect their reinstatement. See, e.g., *Northern Wire Corp*., 291 NLRB 727, fn. 4 (1988), where the Board acknowledged that, for backpay computation purposes, the 5-day lag period reflects a ''reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an or-

[100] Id. at 137. More specifically, in *American Linen*, the Board found that the respondent-employer's bulletin to strikers stating that strikers would be treated as ''permanently replaced'' if they did not meet a strike return deadline was false, and thereby ''amounted to an unlawful termination threat.'' Id. at 137. The Board held further (id.) that when the deadline ''arrived without the Respondent's having corrected its erroneous replacement claim and without the employees' having yielded to the threat by abandoning their strike at the outset, the unlawful terminations occurred.''

derly manner.'' From this, WestPac argues that its actual reinstatement of the August 30 strikers within 24 hours of their offer to return must necessarily be presumed to have been a ''reasonable'' delay. This argument, however superficially appealing, is defeated by the Board's holding in *Northern Wire*, within the same passage just quoted, as follows:

> The 5-day period serves no useful purpose, however, when a respondent has rejected, unduly delayed, or ignored an unconditional offer to return to work. That is the situation here. Accordingly, backpay will commence as of the date of the unconditional offer to return to work . . . . [Id at fn.5.]

I find that WestPac, like the employer in *Northern Wire*, supra, had no ''need'' grounded in any considerations of ''orderliness'' to delay the return of the six strikers. I further find that WestPac simply ''ignored'' the strikers' offer to return for several hours, until approximately 6 p.m., when Lilleberg began to call the strikers with instructions to report to work the next morning. I further find that Engel's false statement between 3:15 and 3:45 p.m. that the strikers were being replaced amounted to a ''rejection'' of their offer to return. I further find, in any case, that WestPac ''unduly delayed'' their return by not reinstating them immediately, under circumstances where their jobs were vacant and WestPac urgently needed their services, and therefore, any delay in their reinstatement was an ''undue'' one.

Accordingly, I conclude as a matter of law that when WestPac refused to reinstate the August 30 strikers immediately upon their offers to return, it independently violated Section 8(a)(1) and (3) of the Act.[101]

3. Alleged August 31 through September 2 discrimination against returnees

The complaint alleges, in substance, that during the 3 days that the six August 30 strikers worked after returning from their first strike (i.e., Tuesday, August 31 through Thursday, September 2), WestPac unlawfully discriminated against the six in three related ways, (1) by limiting their work hours while giving extra hours of work to the nonstrikers, (2) by ''isolating'' and ''closely scrutinizing'' them, and (3) by reassigning two of them, Martin and Bonnickson, to jobs at Texaco. The complaint further alleges that these unlawful discriminations were motivating or causative factors in the second strike, and thereby cloaked the strikers with the special protections accorded to ''unfair labor practice strikers.'' I set forth below the facts pertinent to each count of discrimination and to the motivations of the participants in the second strike.

a. *Facts*

(1) Denial of extra hours of work

Shepler and Mike Russell testified in general terms that in the 3 days after their return from their first strike, they and the other four strike returnees were only allowed to work the 7 a.m. to 3:30 p.m. schedule that prevailed before August 30, whereas all of the nonstrikers reported to work at 6 or 6:30 a.m. every morning, and did not leave the job until around 4:30 p.m. each day. Further, Mike Russell testified that on or about Wednesday, September 1, he asked Engel why the strikers had not been offered the extra hours, and that Engel replied that they weren't ''needed.'' (Engel did not clearly dispute this latter testimony, and therefore I credit Mike Russell.) Neither did Engel nor any other witness specifically dispute Shepler's and Mike Russell's testimony that the nonstrikers were given all the extra hours during the 3-day period in question. However, as I discuss next, WestPac's timesheet records, although largely corroborative of Shepler's and Mike Russell's descriptions of this disparity in hours, paint a somewhat more complex picture.

Set forth below is a chart, derived from undisputed data contained in General Counsel's Exhibit 46, a collection of WestPac's timesheets for persons who worked on the Burlington job in the week beginning Monday, August 30, and ending on Sunday, August 5. The chart below confines itself to the hours worked on Monday through Thursday of that week by 14 electricians, not counting Engel and Hollinger. The first six named are the August 30 strikers; the last eight are the electricians who were on the job on August 30 but did not strike.

DAILY HOURS FOR BURLINGTON WORKERS, AUGUST 30 THROUGH SEPTEMBER 2

	Mon. 8/30	*Tues. 8/31*	*Wed. 9/1*	*Thurs. 9/2*
G. Blackwell	3.5	8	8	8
D. Bonnickson	3.5	8	8	8
J. Martin	3.5	8	8	8
Mike Russell	3.5	8	8	5
Matt Russell	3.5	8	8	8
J. Shepler	3.5	8	8	8
A. Ainsworth	9	9	8	11
D. Ashton	10	7	9	7
R. Churchill	9	9	8	10
M. Davis	9	9	8	11
S. F!is	9	0	0	11
J. Killebrew	10	8.5	9.5	10
M. Powell	9	9	8	11
K. Southey	9	9	8	8

Apart from confirming that nonstrikers worked an extended shift on Monday afternoon, this chart further confirms that, in the following 3 days, most nonstrikers worked more hours in total than did the returning strikers. Thus, it shows that on Tuesday, the six strikers worked a standard, 8-hour shift, whereas all of the nonstrikers on the site that day, save Ashton, worked a 9-hour shift.[102] It also shows that on Wednesday, everyone on the site that day worked an 8-hour shift except nonstriker Killebrew, who worked 9.5 hours. It further shows that on Thursday, the strikers worked no more than 8 hours (in fact, Martin worked only 5 hours), but that most of the nonstrikers on the site that day (i.e., all but Ashton and Southey) worked 10 or 11 hours. Clearly, therefore, the chart shows at the least that the substantial number of

[101] I find an independent violation under Sec. 8(a)(3) because it is apparent from the foregoing findings that WestPac's agents perceived the strike by the six August 30 strikers as being closely related to, or an extension of, the Unions' organizing drive.

[102] The record does not otherwise explain why nonstriker Ashton worked only 7 hours on Tuesday, or why nonstriker Ferris worked no hours at Burlington on Tuesday or Wednesday.

extra hours worked during the 3-day period in question were awarded only to nonstrikers.

WestPac's witnesses, seeking to explain this discrepancy, generally testified that the nonstrikers were assigned during this 3-day period to high-priority tasks in the computer room and the switch-gear room. WestPac argues on brief that the priority of getting such work finished promptly justified the imposition of an overtime regime for such work. Apparently, we are asked to assume for these purposes that it was merely coincidental that only nonstrikers were assigned to work on these supposedly high-priority tasks in the computer and switch gear rooms.

(2) Isolation and scrutiny of strikers

The testimony of the employee-witnesses called by the General Counsel concerning these matters is somewhat fragmentary and impressionistic: Shepler, echoed in large part by brothers Mike Russell and Matt Russell, testified generally that, unlike before the strike, he and the other returning strikers were assigned to solo tasks in the days after their return, and that he felt that the returnees were being ''watched all the time.'' By contrast, Engel, echoed in part by Hollinger, testified in summary terms that when all the strikers returned, they continued to perform the tasks they had performed just before the strike, and that he got no instructions from Lilleberg to isolate the strikers and that he gave no such instructions to his own foreman, Hollinger. I find that the accounts of the prosecution witnesses are more reliable than Engel's and Hollinger's generalized averrals and denials.

Thus, Engel does not deny, and Hollinger seems to admit, that Shepler and Blackwell were assigned to do conduit installation and wire pulling alone after the strike, whereas previously, they had been doing this work together. Specifically, crediting Shepler, I find that, immediately before the strike, Shepler and Blackwell had been working together on an elevated manlift, installing 10-foot lengths of conduit pipe into racks suspended at regular intervals from the ceiling, and then pulling electrical wire through each length of conduit as it became installed. (In the latter process, a ''fish'' wire or tape is passed through a length of conduit, then its tail end is fixed to the electrical wire to be pulled, then one worker pulls on the fish line from the outfeed end while the other guides the electrical wire into the infeed end.) Crediting Shepler and Mike Russell, the normal, and the most time-efficient practice in the trade is to use two workers for such tasks. Moreover, although Hollinger quibbled over this point, both Engel and LaRoche generally agreed that doing wire-pulling alone is quite inefficient and undesirable, because the coated wire being pulled will tend to hang up at the infeed end, and to become stripped or otherwise damaged, unless a second worker is positioned to guide the wire into the infeed end as the first worker pulls from the other end.

Relatedly, no one specifically contradicted returning striker Matt Russell, whose testimony I rely on to find as follows: Before the strike, Matt Russell had been performing various low-skill tasks, including helping other electricians on an as needed basis. On several occasions in the week before the strike, he was assigned to help Rob Churchill (who did not join the strike) pull wire through conduit in a section of the building called the A-quadrant. In the days following the strikers' return, Matt Russell noticed that Blackwell was hanging conduit and pulling wire by himself in A-quadrant. (Apparently, nonstriker Churchill was reassigned, poststrike, to work in the supposedly ''high-priority'' switch gear and computer rooms.) On two occasions, Blackwell asked Matt Russell to help him pull wire; on each occasion, Foreman Hollinger intervened soon after Matt Russell came to Blackwell's aid, and instructed Matt Russell that he was not to assist anyone unless Hollinger told him to do so. Similarly, Shepler's uncontradicted account shows, and I find, as follows: Sometime between August 31 and September 2, Shepler was working alone installing ceiling conduit. When he neared an area where Matt Russell was working alone, and called out a greeting to Matt, Engel appeared and abruptly directed Shepler to abandon what he was doing and to move to another task.

(3) Reassignments of Martin and Bonnickson to Texaco

As all parties agree, Project Manager LaRoche came to the Burlington site on the afternoon of Thursday, September 2, and told former strikers Martin and Bonnickson he needed them to transfer to the Texaco job the next day. Neither of them initially refused or argued about this transfer. LaRoche further testified that he told Martin and Bonnickson that the transfer was not ''permanent,'' but would be for up to 2 weeks. Bonnickson did not deny this[103] and Martin did not testify. I credit LaRoche on the point at issue. However, I discredit LaRoche insofar as his testimony suggests that LaRoche alone made this selection decision, supposedly based on his review of the background qualifications of the Burlington crew, or that Lilleberg played no role in selecting who was to be transferred. I further discredit both LaRoche and Lilleberg insofar as they claim that the reason for the transfer decision was an urgent request made by WestPac's Texaco site superintendent, T. J. Nelson, for additional help. Set forth below are my reasons in each instance:

LaRoche seemed to be trying to distance Lilleberg from the transfer decision; he testified in substance that he had gotten an urgent request from Nelson for extra help at Texaco, and that he simply used his own discretion in selecting the two workers to be transferred to meet Nelson's demands, and chose Bonnickson and Martin because of their ''industrial experience,'' as revealed by their job applications. This testimony does not fit well with any other evidence. Most significantly, LaRoche's account is contradicted by Lilleberg, who said in a pretrial affidavit, ''I asked Joe Engel to ask Bonnickson and Martin to make this transfer.'' Moreover, when questioned at trial about this feature of his affidavit, Lilleberg's only quibble was that it failed to reflect that ''Alan [La Roche] was [also] involved.'' Thus, I find, contrary to LaRoche, that Lilleberg not only directed that two workers be transferred to Texaco, but specifically selected Bonnickson and Martin as the transferees. And under those circumstances, LaRoche's claim that he selected Bonnickson and Martin based on a belief that they had ''industrial'' experience may be seen simply as an invention.[104] In addition,

[103] Prosecuting counsel state on brief (p. 50, fn. 139) that ''Bonnickson's [sic] testified that they [he and Martin] were not given such assurances of the length of the transfer.'' In fact, however, Bonnickson gave no such testimony, neither in the transcript portions cited in the prosecution brief, nor elsewhere.

[104] In this regard, although Bonnickson's application did reflect some industrial experience, my findings, supra, show that LaRoche,

Texaco Superintendent Nelson's testimony clearly undermines both LaRoche's and Lilleberg's claims that Nelson's demand for extra hands at Texaco inspired the transfer decision. Thus, Nelson testified, in substance, that he had felt himself chronically short handed at Texaco, and had been ''calling the office'' for more help repeatedly (''basically constantly . . . on a daily basis''), ever since the ''end of July,'' only to be rebuffed each time. Strikingly, however, Nelson could not recall having made any particular request for help at Texaco during the week of August 30, and he was unaware that any decision was being made or had been made during that week to transfer anyone from Burlington to help him. Strikingly, moreover, WestPac had already arranged on Wednesday, September 1 (see findings, infra) to bring two Eagle-Puyallup workers, Beyer and Montoya, to work at Burlington on Saturday, September 4, based on a recognition that the Burlington project was way behind schedule and that an extra, Saturday shift would be required to try to catch up. In sum, it appears that Nelson's ongoing request for extra hands had fallen on deaf ears because of the priority attached to the Burlington work, a priority that prevailed throughout the week of August 30, as extra hours and extra shifts were scheduled for Burlington, and that it was only after Lilleberg was compelled to return the strikers to the Burlington job that Lilleberg somehow became inspired to tinker with these priorities by transferring two returning strikers to Nelson's job at Texaco.

A final fact deserves recording: The conditions of work at Texaco were decidedly different from those at Burlington, and by comparison, far less desirable. WestPac's contract with Texaco required its employees to do extensive welding and high-voltage wiring and associated installation of heavy-duty conduit on a new precipitator tower (estimated variously to be from 80- to 150-feet high), to be used by Texaco to minimize the emission of refinery pollutants into the atmosphere by first passing them through an electrostatic precipitator. It is a noticeable fact that refinery work in general involves unique risks and hazards of injury, sickness or death—from fires, explosions, and exposures to extremely hazardous chemicals in liquid and gas form—which workers do not typically encounter on a commercial electrical installation job.[105] Moreover, apart from the unique risks, even the normal conditions of day-to-day work within a refinery complex are experienced by most people as hellish, and WestPac's job at Texaco was clearly no exception. Thus, when Superintendent Nelson was asked to describe the ''working conditions'' at Texaco, he replied without hesitation, ''It was filthy; it stunk; it was hot; and most of it was about 80 feet off the ground.'' He also volunteered in summary that this work was ''pretty bad,'' and readily agreed, moreover, that it was ''danger[ous].''

in his prehire interview with Bonnickson, had been especially interested in Bonnickson's ''commercial,'' not ''industrial,'' experience, because WestPac needed such skills for its ''high-paced'' work at Burlington. In addition, Martin's application did not reflect that Martin had any ''industrial'' experience. Moreover, nonstriker Steve Ferris' application reflected industrial experience, yet LaRoche became ever more vague when pressed as to why he had not tagged Ferris, or some other nonstriking Burlington crewmember, for the transfer to Texaco-Anacortes.

[105] See also, Chapman testimony, Tr. XV 1670:13–25.

b. *Analyses and conclusions of law regarding alleged discrimination against returnees*

It is clear enough that WestPac gave returnees no more than 8 hours of work on August 31, and September 1 and 2, while awarding the substantial number of extra hours worked by the Burlington crew in that 3-day period only to nonstrikers. It is likewise grossly apparent, even if some details are fuzzy or equivocal when viewed in isolation, that WestPac more generally took steps to prevent the strike returnees from having contact with one another or with nonstrikers by separating at least Shepler and Bonnickson and requiring them to perform installation and wire-pulling tasks alone which they had been performing together before the strike, and by affirmatively intervening to prevent such contacts in the rare instances where they presented themselves (e.g., Hollinger's warnings to Matt Russell not to assist Bonnickson unless Hollinger so instructed, and Engel's abrupt reassignment of Shepler to a new task when his current one brought him within speaking distance of Matt Russell). It is likewise clear that the transfer of Bonnickson and Martin to the Texaco site would further divide and isolate the strikers from one another, and, given the notoriously less desirable conditions of work at Texaco, would be seen by them and others who became aware of this transfer as a kind of punitive demotion.

It is now understood as a general rule of law that, ''once reinstated, strikers must be treated uniformly with nonstrikers and permanent replacements; whatever benefits accrue to the latter from the existence of the employment relationship must also accrue to the returning strikers.'' *NLRB v. Transport Co. of Texas*, supra, 438 F.2d at 264. Indeed, in particular contexts, such as the granting of ''superseniority'' to nonstrikers or replacements, an employer's failure to treat returning strikers uniformly with the latter groups is seen as ''so 'inherently destructive of employee interests' that it may be proscribed without the proof of an anitunion motive that is generally required for violations of § 8(a)(3).'' Id. at 264–265, and authorities cited. Thus, it may be questioned whether the obvious disparities found above in WestPac's treatment of the strike returnees compared to the nonstrikers at Burlington even requires a ''motive'' analysis under *Wright Line*. I would find that where, as here, WestPac withheld overtime hours from the returnees made available to the nonstrikers, and isolated the strikers from one another and from the nonstrikers, and selected only returning strikers Bonnickson and Martin for transfer to Texaco, the nakedness of these disparities in treatment had an inherently destructive impact on employees' rights, and thus violated Section 8(a)(1) and (3) without regard to whether or not WestPac specifically intended that impact.

Alternatively, employing a *Wright Line* analysis, and considering the record as a whole, I find at the threshold that the General Counsel made a prima facie showing that the six strikers' protected strike on August 30, and their evident association with Local 191's Chapman in that enterprise, were motivating factors in WestPac's postreinstatement adverse treatment of them, as just summarized. This finding is influenced broadly by my other findings above and below showing that WestPac operated overall in an atmosphere of anitunion animus, and committed a significant number of distinct, unlawfully discriminatory acts against known or suspected IBEW-affiliated workers. Moreover, focusing for the

moment on Lilleberg's decision to transfer Bonnickson and Martin to Texaco, the prima facie showing of discriminatory motive is buttressed by Duncan's and Personett's credited testimony that Lilleberg told each of them, in substance, that his intentions was to limit the numbers of ''union'' workers on any given jobsite.

The question remains whether WestPac satisfied its burden of demonstrating that it would have treated those returnees in the same manner even absent their protected strike activity and apparent association with the IBEW. For reasons which I think are evident in findings I have already made, I judge that WestPac did not carry this burden as to any feature of its adverse treatment of the strike returnees. Indeed, I find that in trying to explain these features, WestPac again did little more than to reinforce the General Counsel's prima facie showing.

Thus, it appears that WestPac would explain the extra hours it gave only to nonstrikers on the ground that the nonstrikers were given high-priority tasks requiring overtime work, whereas the strike returnees were not given such high-priority tasks. In fact, WestPac's witnesses were somewhat contradictory as to who was working where at any given point between August 31 and September 2, and I doubt in any case that their purported recollections of these details, offered more than a year after the event, were reliable ones. Nevertheless, assuming, arguendo, that all the nonstrikers worked only on such high-priority tasks during the 3-day period, what makes this explanation a lame one for *Wright Line* rebuttal purposes is that WestPac has failed to further explain in any coherent, nondiscriminatory terms why it was that only nonstrikers happened to have been given such high-priority work. And absent an explicit, plausible, and innocent explanation for this inherently suspicious phenomenon, I could hardly find on this record that mere coincidence accounted for WestPac's exclusive resort to nonstrikers for any overtime assignments. Rather, WestPac's explanation merely served to reinforce the appearance that WestPac was trying to isolate the strike returnees not just from one another, but from the nonstrikers—by making sure that the returnees would not perform tasks in the computer or switch gear rooms where, so WestPac claims, the nonstrikers were bunched together performing that supposedly ''high-priority'' work.

WestPac's attempts to advance a legally innocent reason for ordering Bonnickson and Martin to transfer to Texaco suffered from somewhat different problems—mainly, the contradictions between and among its witnesses, and the inherent curiosity of such a decision in the light of surrounding circumstances. Thus, relying in substantial part on Lilleberg's never-disavowed admission in his pretrial affidavit that he ordered that Bonnickson and Martin be picked for this transfer, I have discredited LaRoche's attempt to claim instead that he selected Bonnickson and Martin for the transfer, supposedly based on a general and impartial review of the ''industrial'' experience or lack thereof of all the members of the Burlington crew. Also, relying in substantial part on Texaco Superintendent Nelson's testimony that he had made no special request for extra help in the week of August 30, and was unaware of any plan to transfer Bonnickson and Martin, I have discredited both LaRoche's and Lilleberg's attempts to claim, on the contrary, that a request from Nelson was what triggered the decision to transfer Bonnickson and Martin. Finally, I note that, even while WestPac was ordering Bonnickson and Martin to transfer to Texaco, it had already gone to the extraordinary step on September 1 of making arrangements to bring two electricians from the Eagle-Puyallup site, Beyer and Montoya, to work an unprecedented Saturday, September 4 shift at Burlington. (See further findings, infra.) Thus, in the end, WestPac did not persuade me that the transfer decision would have been made for any reason other than the most obvious one, given the General Counsel's showing—a further wish to punish strike returnees not merely by separating them and isolating them from their fellows, but by banishing Bonnickson and Martin to a less desirable and more remote worksite.

Accordingly, I conclude as a matter of law that in each instance of adverse treatment of August 30 strike returnees described above, WestPac violated Section 8(a)(3) and/or Section 8(a)(1) of the Act.

4. The September 3–7 ''unfair labor practice'' strike

a. *Facts*

This is the undisputed situation in overview: On the morning of Friday, September 3, the six August 30 strikers, soon joined by WestPac/Texaco site employees White and Hill, began a second strike and picketing of WestPac's operations at Burlington and Texaco, which they continued on Saturday, September 4, at Burlington, where WestPac had ordered an unprecedented Saturday shift, and which they resumed on the morning of Tuesday, September 7, WestPac's first day of operations following the Labor Day holiday weekend. At some point around midmorning on September 7, however, the (now eight) strikers prepared and individually signed a common letter setting forth their unconditional offer to return to work, a letter which Engel treated as if it were radioactive when Shepler tried to place it in his hands. At 9 a.m. the next morning, however, as the parties stipulated, Lilleberg received a copy of this letter, apparently transmitted to him via fax. Later on September 8, the would-be returnees carpooled to the Woodinville office, where they tried to deliver their letter personally to Lilleberg. Lilleberg dodged their visit and eventually directed Coers to send them away, and to give them a printed notice warning them that they were vulnerable to ''permanent replacement.'' However, at about 6:30 p.m. on the evening of September 8, Lilleberg called all eight strike returnees; he told Matt Russell that he had been ''permanently replaced''; he told Shepler to return the next day to the Burlington site; and he told the other six to report the next day to the Texaco job. The interstitial details set forth below are likewise undisputed unless I note otherwise.

After Bonnickson and Martin learned on September 2 that they would be transferred to Texaco, they conferred about this development and grew more dissatisfied with the transfer. Martin had a beard, and he knew (as did Engel, LaRoche, and Lilleberg) that Texaco had a no-beard policy, because a beard would prevent a proper fit of the face masks or hoods or breathing devices that workers in refineries must wear under some conditions, including in an emergency. Bonnickson objected that working at Texaco would extend by another 40 miles his daily commute from his home near the Canadian border. They both began to voice suspicions that WestPac intended by this transfer to ''divide and conquer'' the former strikers. They found Shepler after work and

complained to this effect to him. Shepler called a meeting of former strikers at his home that evening, attended by all six former strikers and, as well, by Local 191's Chapman.

During the September 2 evening meeting, Bonnickson and Martin repeated their complaints and suspicions about their transfer. Shepler and Bonnickson and others voiced additional complaints that they had not been offered overtime work since their return, even while nonstrikers were regularly getting overtime work, and that they were being ''isolated'' and ''nit-picked'' by the close scrutiny of their supervisors. Chapman counseled that the workers could either ''put up with'' this catalogue of abuses, or they could begin an ''unfair labor practice strike,'' and then file charges with the Board over the abuses. The participants agreed to meet again at 5:30 a.m. the next morning at Shepler's house to make a final decision.

On the morning of Friday, September 3, the six former strikers met again at Shepler's house, with Chapman in attendance. While there seemed to be a consensus among them to strike, Chapman counseled that, to ''do it right,'' they had to take a vote. They all voted to strike, then retrieved the same picket signs they had used on August 30 from Chapman's car trunk, then started picketing with these signs both at the Burlington site and at the Texaco site. Their picketing at Texaco induced two WestPac workers at that site, Mike Hill and Danny White, to walk off their jobs and join them on the picket line. Later that day, all of the strikers, now eight in number, signed a handwritten letter to Lilleberg, drafted by Mike Russell, and faxed a copy of it to voted to go on strike. WestPac's offices in Woodinville. The letter said in material part:

> Mr. Lilleberg;
>
> We the undersigned employee's [sic] of WestPac Electric feel we have been treated unfairly. As of the beginning of working hour's [sic], Friday, Sept. 3, 1993 we have unanimously voted to go on strike.

The new group of 8 strikers also went to the Board's Seattle Regional Office on the afternoon of September 3, where Shepler signed and filed an unfair labor practice charge in Case 19–CA–22930, which alleged in pertinent part, as follows:

> During the past six months, the Employer . . . discriminated against employees because they joined together for the purpose of seeking better wages and working conditions by:
>
> 1. Denying overtime to employees;
> 2. isolating and surveilling upon employees;
> 3. threatening employees with termination and in other manners, discriminated against Jim Shepler, Dave Bonnickson, Jim Martin, Danny White, Mike Hill, Greg Blackwell, Matt Russell and Michael Russell.

The Regional Director mailed a copy of the strikers' August 3 charge to WestPac on the following Tuesday, September 7, after the extended Labor Day holiday weekend. WestPac received this letter on September 8. In the meantime, on September 7, as elaborated below, the strikers had already successfully communicated an unconditional offer to return to work.

The eight strikers picketed at the Burlington site on Saturday, September 4, when WestPac had a crew working at Burlington, based on a decision to schedule a Saturday shift which Engel and Lilleberg had made on Wednesday, September 1, before the second strike.[106] Two electricians from the Eagle-Puyallup site, Tim Beyer and Mike Montoya, arrived at the Burlington jobsite that morning, having been told by their Puyallup superintendent, Johnston, on September 1 (see last footnote), that WestPac was adding a Saturday shift at Burlington and needed more help. When Beyer confirmed this arrangement shortly before the end of the work day on September 3, Johnston did not tell Beyer of the new strike and picketing at Burlington. Thus, Beyer and Montoya were surprised when they arrived at the Burlington site on September 4 and saw the picketing. They asked the pickets what was going on. In response, one of the pickets (I find it was Mike Russell) made reference to WestPac's ''unfair labor practices,'' and further referred to the strikers' earlier demands for a ''pay increase,'' which had caused them earlier to ''go out on a strike,'' after which they had ''gone back'' to work, after which ''everything had changed,'' and that WestPac had ''picked these six guys out.''[107] After talking to the strikers, Beyer and Montoya then approached Engel, who urged them to get their tools and go to work. They balked, and asked Engel what the picketing was about. Engel replied that the pickets were ''upset because they'd like higher wages, that they'd like 22 dollars an hour like the union guys make and they weren't going to get it.'' Later, after again talking briefly with the pickets, Beyer and Montoya went back to Engel, who said that ''three of those guys out there, they're with the union,'' and identified Shepler as the their ''ringleader,'' and said that, ''ever since he's been on the job, here, he's been causing a lot of hate and discontent and . . . stirring things up,'' or ''starting a bunch of shit.'' (I do not credit Beyer's belated and hazy claim that Engel

[106] Contrary to WestPac's claim on brief (p. 20), WestPac did not schedule the Saturday, September 4 work ''as a result of the second strike on Friday [September 3].'' Rather, Eagle-Puyallup employee Beyer convincingly testified without contradiction that he learned of the available Saturday work at Burlington from his own superintendent, Johnston, on Wednesday, September 1, after the first strike had ended, and before the second strike had begun. Indeed, although Engel first testified in response to questioning by WestPac's counsel that he ''probably'' made the ''decision'' to schedule the Saturday shift on ''Friday,'' Engel later admitted on cross-examination that he ''believed'' that he had actually made this decision on either ''Wednesday or Thursday, the 1st or the 2nd,'' and that Lilleberg had then agreed to ''get me some people for Saturday.'' Moreover, Engel clearly admitted in nearby passages that his decision to schedule a Saturday shift was to ''make up'' for and to ''recover'' the ''lost hours'' resulting from the strike on ''August 30,'' not the strike that began on September 3.

[107] These findings rely primarily on Mike Russell's memory of what he told Beyer at this time; Beyer's testimony was not inconsistent, and he specifically recalled that one of the pickets (whose name he did not know) said that ''there was a lot of unfair labor practices.'' On brief (p. 20), WestPac relies on a distorted version of Beyer's testimony to aver that Beyer ''was advised that the strike was about wages.'' In fact, Beyer consistently testified on both direct and cross-examination that one or more of the pickets mentioned WestPac's ''unfair labor practices,'' as a reason for the strike, although his testimony further suggests that the pickets weren't specific about what unfair labor practices they might have been referring to, and that low wages were the only specifics they mentioned.

also said at this time that Shepler and/or the strikers no longer had jobs with WestPac.[108])

On the afternoon of Tuesday, September 7, after consulting with Chapman, the eight strikers determined that their strike was getting them nowhere, and they signed a handwritten letter, addressed to Lilleberg, which said, ''We unconditionally offer to return to work.'' They then went to the Burlington site, where Shepler tried to present their written offer to Engel, who admittedly recoiled, saying, ''I don't want anything to do with it,'' and told the returnees that they should take their writing to Lilleberg. He also again refused to let them use his jobsite phone to call Lilleberg. The returning strikers called Lilleberg's office from Shepler's home in Mount Vernon the same afternoon, and, upon being informed by the receptionist (presumed to be Duncan) that Lilleberg was ''busy,'' or ''not available,'' they each left messages that they were ''unconditionally offering to return to work.'' They then returned to the Burlington site, where Engel admits that Bonnickson told Engel that ''they wanted to come back to work.'' Engel also recalled, ''I think I phoned Steve Lilleberg and told him that they had been back and they wanted to come back to work.''

The next day, Wednesday, September 8, the eight returning strikers traveled together to Woodinville, and tried to deliver their return-offer letter to Lilleberg, who was present in his office, but ''unavailable.'' (By then, as the parties stipulated, Lilleberg had already received a copy of their written offer to return.) The eight were sent to wait in a downstairs warehouse area. Coers came down from the office about an hour later and joined them; Shepler gave him the strikers' letter offering to return, and Shepler voiced the same message to Coers, asking to meet directly with Lilleberg. Coers took the letter, but told the returnees that Lilleberg was unavailable and that they would have to call to make an appointment. He repeated this message after refusing Shepler's request that they be allowed simply to go upstairs and make the appointment with the receptionist. Coers also handed each worker a letter, dated ''September 7,'' which said, in capital letters:

> NOTICE TO ALL PROTESTERS
> RE: POTENTIAL REPLACEMENT
>
> PLEASE BE ADVISED THAT, SHOULD THE CONSTRUCTION SCHEDULE REQUIRE, WESTPAC ELECTRIC, INC. MAY FILL YOUR POSITION ON THIS PROJECT WITH A PERMANENT REPLACEMENT.

The returnees went to one of their cars in the parking area, where Shepler used a mobile phone to call into the office. As he placed the call, he could see Coers and Lilleberg looking down at them from an office window. Campbell fielded Shepler's call; she told Shepler that Lilleberg was not available for an appointment that day, and that he should call later in the afternoon to try to schedule an appointment for another day. The eight returnees then drove away from the premises. At about 3 p.m., with the eight still together, Shepler again called the Woodinville office; the receptionist told him that Lilleberg was now in a meeting, and that Shepler should call back in 45 minutes. Shepler did this 45 minutes later; the receptionist told him that Lilleberg had left the meeting but was still unavailable, and suggested that Shepler try again in 15 minutes. Shepler called back 10 minutes later; the receptionist told him that Lilleberg had left for the day, but confirmed that Lilleberg knew that Shepler was trying to reach him, and gave Shepler Lilleberg's mobile phone number. Shepler then called that number and, when he got an answering machine, he left the message that he was unconditionally offering to return. The other seven returnees then individually performed the same ritual.

As I have previously noted, on the evening of Wednesday, September 8, Lilleberg called each of the would-be returnees. He told Matt Russell that he had been permanently replaced; and told the rest of them to report back to work on September 9; however, Shepler was the only one in this latter group who was told to return to Burlington; the others were told instead to report to the Texaco site. It was unremarkable that White and Hill were directed to return to their same jobs at Texaco. But it is rather more remarkable that the others were told to go to Texaco, for the central effect of this decision was to pull a total of three journeymen (Bonnickson, Martin, and Mike Russell) and one late-stage apprentice (Blackwell) from the Burlington job at a time when that job was still behind schedule and Engel admittedly needed all the experienced hands he could get. Indeed, in what I regard as an understatement, Engel admitted that he ''grumbled'' about this loss of the four men when Lilleberg told him of the decision to transfer them to Texaco.

b. *Analyses and conclusions of law regarding WestPac's responses to the second strike and the offers to return*

(1) Unfair labor practice motivation for the second strike

Having found that WestPac committed additional acts of unlawful discrimination against the August 30 strikers in the 3 days after their return, I am asked by the prosecution to find that those unfair practices played a causative role in the workers' September 3–7 strike. For reasons explained below, I find that they did.

I emphasize first, as did the Board in *Northern Wire*, supra, 291 NLRB 727 at fn. 4, that ''the issue in this context is whether the employees in deciding to go on strike were motivated, in part, by the unfair labor practice of the Respondent, not whether, without that motivation, employees might have struck for some other reason.'' I note further that

[108] At a midpoint in counsel for the General Counsel's direct examination of Beyer, I asked which parts of the complaint Beyer's testimony was intended to address. Counsel for the General Counsel, cited, among other counts, par. 6(c), which alleges in substance that Engel on September 4 told employees that ''strikers . . . had been fired because of their strike activity.'' At the conclusion of Beyer's direct examination, I asked prosecuting counsel what part of Beyer's testimony supported the par. 6(c) count; he recalled (mistakenly) that Beyer had testified that Engel had said to Beyer, ''those guys, especially the big one, have been fired.'' WestPac's counsel said he recalled no such testimony from Beyer, and I echoed this statement. Still later, after cross-examination, the Charging Parties' attorney tried to backfill, eventually eliciting from Beyer that Engel had made some statement to the effect that the strikers ''were no longer employees.'' On brief (p. 53), the General Counsel now stands on that backfill. Contrary to the General Counsel, I give no weight to Beyer's testimony in this particular regard, which I found to have an improvised and quite uncertain quality. I would therefore dismiss par. 6(c) as wanting in reliable proof.

in enforcing the Board's decision in *Northern Wire*, the Seventh Circuit echoed and reaffirmed this statement of the issue. *Northern Wire Co. v. NLRB*, 887 F.2d 1313 (1989). See also, e.g., *Decker Coal Co*., 301 NLRB 729, 746–747 (1991), and authorities cited. Here, apart from any evidence that might suggest that the participants in the second strike continued to want pay parity with Cochran electricians (which disparity was concededly the motivation for the first strike), the evidence clearly shows that the participants in the second strike were also moved, at least in part, by WestPac's unlawful discriminations against them upon their return from the first strike. Thus, they talked about these discriminations in their September 2 meeting at Shepler's house, and they filed unfair labor practice charges with the Board protesting these same discriminations within hours after beginning their strike on September 3. And on September 4, they referred in general terms to these postreinstatement discriminations in their conversations with Eagle-Puyallup workers Beyer and Montoya when the latter arrived to perform Saturday work at Burlington. Accordingly, even if the strikers might have decided to begin their second strike for purely economic reasons in the absence of WestPac's unlawful discriminations, the presence of those discriminations was clearly a factor that figured in their motivation to begin the second strike. Therefore, the participants in the second strike are properly treatable as ''unfair labor practice strikers,'' with special rights and immunities under the Act that distinguish them from mere economic strikers, as I discuss further below.

(2) Interference with and discrimination in reinstatement

The complaint alleges and the General Counsel argues, in substance, that WestPac violated Section 8(a)(1) and/or (3) when, (1) it failed and refused to reinstate the eight unfair labor practice strikers upon their September 7 offers to return; (2) it delivered letters via Coers to the returnees on September 8 threatening them with ''permanent replacement'' even though they had by then ended their strike; (3) Lilleberg effectively ''terminated'' Matt Russell later on September 8 by telling him he had been ''permanently replaced''; and (4) Lilleberg told Bonnickson, Martin, Blackwell and Mike Russell on the evening of September 8 that they would have to transfer to the Texaco jobsite. For reasons I summarize below, I find merit to each of these counts.

First, independent of the ''unfair labor practice'' character of the second strike, I find, based on my rationales in preceding sections, that WestPac owed—and violated—at least a conventional *Laidlaw* duty immediately to reinstate all returnees not permanently replaced upon their communications to Engel and to WestPac's office on the afternoon of September 7 of their unconditional offers to return to work. It is clear that a period of more than 24 hours elapsed after they made those offers before Lilleberg called them with his answer. It is equally clear that during this attenuated period, Lilleberg and other WestPac agents took pains to avoid the returnees' repeated efforts to present their return-offers to Lilleberg. This behavior causes me to judge that WestPac ''ignored'' the strikers' return offer and ''unduly delayed'' their return within the meaning of *Northern Wire*, supra. Moreover (excepting for the moment the case of Matt Russell), the record fails to show that this ignoring of and delay in responding to the strikers' offer to return was linked in any way to any compelling, nondiscriminatory ''business justification.'' Rather, Lilleberg's various dodgings and delays appear to have been motivated by nothing other than a wish on his part to buy time to construct new strategies for avoiding WestPac's reinstatement obligations. Accordingly, based on its undue delays alone, I conclude as a matter of law that WestPac unlawfully discriminated against and unlawfully interfered with the rights of returning strikers within the meaning of Section 8(a)(3) and (1) of the Act.

Second, focusing for the moment on Bonnickson and Martin, and again independent of other rationales, infra, I note that WestPac's eventual reinstatement offer was only to quite different and notoriously undesirable refinery work at Texaco, and not to their former positions at the Burlington jobsite. I have found that Lilleberg's original decision, announced September 2, to transfer Bonnickson and Martin to Texaco, was an unlawfully discriminatory one; I note, moreover, that this discriminatory decision and order had not been remedied when, on the evening of September 8, Lilleberg effectively reiterated that same decision and order to Bonnickson and Martin. In these circumstances, I conclude as a matter of law that Lilleberg's September 8 ''offer'' to them of a job at Texaco merely compounded the unremedied discrimination against them, and amounted to an independently unlawful failure and refusal to reinstate them to their former positions at Burlington, in violation of Section 8(a)(3) and (1) of the Act.

For essentially similar reasons, I reach the same conclusions of law as to WestPac's denial of reinstatement at Burlington to Blackwell and Mike Russell. Thus, it is inherently suspicious that Lilleberg decided to transfer four experienced electricians from Burlington at a time when Engel desperately needed them if he was to meet his own completion deadline; and it is doubly suspicious that only persons from the ranks of the returning Burlington strikers were tagged by Lilleberg on September 8 for transfer to Texaco.[109] And even though WestPac again made a confusing and unpersuasive attempt to explain the need to transfer in terms of pressing need at Texaco, its witnesses made no attempt that I can discern to explain why Texaco's needs were more pressing than Burlington's. Neither did WestPac try to explain why Texaco's needs could not have been accommodated by new hires or by transferees from other sites, without resorting to transferring four workers from Burlington, where they were needed. (Soon thereafter, on September 13,

[109] WestPac, relying on Lilleberg's testimony, notes on brief (p. 22) that ''Lilleberg had reassigned [four named employees] from other projects to the Texaco/Anacortes Project.'' If this is intended to suggest that Lilleberg reassigned the four named workers to Texaco at the same time he directed Bonnickson, Martin, Blackwell, and Mike Russell to report to Texaco on the morning of September 9, the suggestion is contradicted by the record. The record (Tr. XVI 1814–1818) shows instead that the four named workers from ''other projects'' were brought to Texaco gradually and intermittently in the days and weeks following September 9—and then only after the returnees from the second strike began their third strike, infra, on September 9 (which strike, as I shall find, was triggered in large part by WestPac's unlawfully discriminatory September 8 transfer of Bonnickson, Martin, Blackwell, and Mike Russell to Texaco). Clearly, therefore, as of September 8, the only ''transfer'' decision Lilleberg had made was simply to transfer the latter group of returning Burlington strikers to Texaco.

Lilleberg admittedly hired two non-IBEW members, William Sugg and Ed Shaw, for work at Texaco. Moreover, as of September 8, there were at least nine applications in WestPac's files from the nonhired discriminatees discussed in the previous section, whose only disqualification for work at Texaco appears to have been their suspected or evident IBEW associations.) Much less did WestPac seek to explain in nondiscriminatory terms why Lilleberg chose only returning strikers to make the September 9 transfer to Texaco. Accordingly, I find, simply, that the additions of Blackwell's and Mike Russell's names to Lilleberg's Texaco-transfer list again traced from Lilleberg's wish to isolate or separate former strikers and IBEW adherents, and to punish them for such protected activities.

Many of these findings are given additional vitality in the light of my earlier conclusion that the participants in the second strike were unfair labor practice strikers, who enjoy unique rights and immunities. In *Decker Coal*, supra, the Board adopted Judge Pannier's analysis of pertinent legal principles, as follows (301 NLRB at 748):

> It is settled that unfair labor practice strikers cannot be permanently replaced, but instead must be offered immediate and full reinstatement on submission of an unconditional application to return to work. *NLRB v. Fleetwod Trailer Co*., 389 U.S. 375, 379, fn. 5 (1967). A corollary to this principle is that Section 8(a)(1) is violated whenever strikers in that category are warned that they will be replaced permanently if they do not return to work. See, e.g., *Bozzutto's, Inc*., 277 NLRB 977, fn. 3 (1985).

From this, several conclusions may be quickly reached: First, it is plain that WestPac could not even lawfully tell returning unfair labor practice striker Matt Russell that he had been permanently replaced, much less could it deny him reinstatement on the asserted basis that he had been permanently replaced.[110] Accordingly, I conclude as a matter of law that when Lilleberg admittedly did both those things, WestPac in each instance violated Section 8(a)(1) of the Act, at least. Second, because unfair labor practice strikers cannot even be ''warned that they will be replaced permanently,'' I easily conclude as a matter of law, that when, on September 8, Coers handed would-be returnees from their unfair labor practice strike a notice warning them that they could be permanently replaced, this warning violated Section 8(a)(1). Third, given the special immunities enjoyed by unfair labor practice strikers, and the radically different and less desirable conditions of work at Texaco compared to Burlington, I conclude as a matter of law that when WestPac failed to reinstate all former Burlington unfair labor practice strikers to their former jobs at Burlington, it failed to accord them the ''full reinstatement'' they were entitled to, and thereby violated Section 8(a)(1) of the Act, at least.

[110] The amended complaint alleges in the alternative, and the General Counsel argues on brief in the alternative, that even if Matt Russell were not an unfair labor practice striker, but only an economic striker, WestPac failed to sustain its burden of showing that it had hired a permanent replacement for him when, on September 8, Lilleberg told him he had been permanently replaced. Given my rationale, I will not reach this alternative theory of violation.

5. The September 9–16 ''unfair labor practice strike''

a. *Facts*

The four second strike returnees who had been ordered transferred to Texaco—Bonnickson, Martin, Blackwell, and Mike Russell—were in doubt about the legality of this transfer. Martin and Mike Russell, and perhaps others, called Chapman on the evening of September 8, and asked him about this. Chapman opined that WestPac had a duty under the Act to give them reinstatement at Burlington. The next day, September 9, the four transferees reported as ordered to the Texaco site for a safety orientation meeting. (In addition, White and Hill, who had been working at Texaco all along, and who had been through the orientation months earlier, went directly to their worksite at the precipitator tower. I will deal later with their experiences in the following days and weeks at Texaco.) Within minutes after the four transferees' arrival at the orientation, however, Mike Russell told Bonnickson and the others that he didn't intend to remain, and thought they should resume their strike. The others agreed, and the four got up and left the meeting and assembled near the Texaco gate, where they were soon joined by Superintendent Nelson. Mike Russell told Nelson that the four were not willing to accept their transfer to Texaco and were entitled to be reinstated at Burlington. Nelson told the protesters that he didn't have anything to do with the assignment decisions and didn't care to, and directed them to call the Woodinville office with their complaints.

The four then drove to Burlington and found a pay phone, from which Mike Russell placed a call to the office and reached Lilleberg. Russell told Lilleberg that the four weren't willing to accept the transfer to Texaco, and believed they were entitled to return to the Burlington jobs that they had ''signed-up'' to perform; Lilleberg replied that it wasn't up to Russell where he would be assigned, and that Russell could either report the next morning to Texaco's safety orientation or ''resign.'' Russell told Lilleberg that he wanted to consult with the NLRB agent he and the others had been dealing with concerning their recent charges. Lilleberg replied, ''Fine, just do that[,]'' and hung up.

The next day, Friday, September 10, Bonnickson called Lilleberg at Woodinville sometime in the midafternoon; he told Lilleberg he was speaking for the group of four transferee strikers, and that they were all willing ''to unconditionally return as a group to Fred Meyer in Burlington.'' Lilleberg replied that he wasn't willing to deal with the strikers as a group, and that it wasn't up to them, but rather to him, to decide where they would be assigned to work.

Shortly after Bonnickson's call to Lilleberg, apparently, the four strikers traveled to Woodinville, where they were joined by Local 46 Agent Freese and Local 76 Agent Grunwald. The strikers began to picket at the end of the driveway leading into the office property, with signs bearing an uncertain legend.[111] During this picketing, Freese walked

[111] In the prosecution brief (p. 58), the General Counsel avers as fact that the picket signs used on September 10 at Woodinville bore legends ''proclaiming Respondent's unfair labor practices.'' It appears (although counsel's tendency to lump citations at the end of a long paragraph's worth of factual assertions leaves room for doubt on this score) that Freese is the General Counsel's sole source for this claim. Thus, Freese testified, ''I think they were unfair labor

up the driveway and entered WestPac's office, where he asked for and received an application form. Lilleberg appeared at this point, and began to say, ''Tell me[,] if I am Episcopalian and you are Catholic . . . ,'' whereupon Freese interrupted and said, ''I am neither one, I am here to apply for a job.'' (Freese elsewhere testified, however, that his principal interest in getting an application was to verify that WestPac was now using a lengthier and more detailed form than previously, and to get a specimen of that form; moreover, he admittedly never completed or returned the application to WestPac.) Lilleberg then escorted Freese out the door and out the length of the driveway, placing his hand at the small of Freese's back to coax him along. (Contrary to the General Counsel, who I think strains overmuch in this regard, I will find no violation of Section 8(a)(1) in Lilleberg's manner of escorting Freese to the end of the driveway. See my supplemental findings and analyses in the miscellany section, infra.)

On Monday, September 13, the four striking Texaco transferees began picketing at the Burlington site. Shepler had been back at work at Burlington since September 9. For the first 2 or 3 days after his return, Engel had assigned Shepler to an isolated wiring task in the ''telephone room,'' an assignment which Engel admittedly chose for Shepler because it was simple and could easily be taken over by someone else in the event Shepler were to strike again.[112] When Shepler saw the pickets appear on September 13, he went out to talk to them, and was soon joined by Engel, who asked Shepler whether he was going to join the picketing workers. Shepler said he didn't think so, and returned to his job. However, about an hour later, Shepler left his job and joined the four on the picket line. He testified that he did this out of ''sympathy with the other people.'' Over the next few days, the strikers (now five, counting Shepler) conducted picketing at Burlington and other jobsites, including at the Eagle-Puyallup site some 100 miles south of Burlington.

On September 14, WestPac published this memorandum to its employees on the subject of ''Work Stoppages'':

> As you are aware, several WestPac employees have chosen to stop work in protest of what they consider unfair practices. A number of you have asked why these individuals are not terminated for refusing to work. The answer is that management is considering a number of responses to this activity but wants to make absolutely sure that its response is completely lawful. These responses include the hiring of permanent replacements, which we have done, and termination if the work stoppages are not bona fide protected strike activity. While we cannot and will not condone work stoppages just for the sake of work stoppages, we will respect the right of WestPac employees to exercise their right to engage in concerted activity for the mutual aid and protection of other WestPac employees. Please be assured WestPac Electric will take appropriate action against those employees whose refusal to perform work has nothing to do with the mutual aid and protection of WestPac employees. We appreciate your patience and hard work through this trying time.

I note that the implication in this memo that WestPac had already hired ''permanent replacements'' for the five participants in the then-pending strike was essentially a false or misleading one, for the record WestPac tried to make on this point shows instead that, as of September 14, WestPac had hired, at most, two persons, William Sugg and Ed Shaw, on September 13, for work at Texaco—ostensibly to ''replace'' Bonnickson and Martin at that site, even though they had never worked there. And the other persons mentioned by Lilleberg as alleged ''permanent replacements'' for participants in the third strike were either hired before the third strike began,[113] or after it was ended on September 16, when, as detailed below, the third-strike participants unconditionally offered to return to work.[114]

practice strikers signs.'' However, the General Counsel called at least three other prosecution friendly witnesses to the event—Bonnickson, Mike Russell, and Grunwald—and did not invite any of them to corroborate Freese's characterization of the legends on the signs. Considering this, I give no weight to Freese's hazy and hestitant terms of characterization.

[112] Engel estimated that the telephone room was about ''Eight by ten [feet]'' in dimension. Crediting Shepler, I find that Engel took him to that room on September 9 and laid out a set of work tasks that Engel pronounced should ''hold [Shepler] for the day.'' Shepler remained at work in that room for 2 more days. Engel, explaining this assignment, admitted that he wanted to give Shepler a ''task'' that would be ''easy enough [for someone else] to pick up if he [Shepler], again walked out or left.'' I further find from Shepler's credible account that, at one point between September 9 and 11, Shepler left the room to borrow a drill bit from another WestPac worker. Later, when he again exited to return the bit, LaRoche stopped him and asked him if he was ''lost.'' Shepler replied that he was returning a borrowed bit. LaRoche then took Shepler to Engel for a conference, and then insisted on accompanying Shepler as he walked through the building to return the borrowed bit, saying at one point to Shepler, ''You know, I'm really disappointed in you.''

[113] At least two such alleged replacements mentioned by Lilleberg, trainees Dean Asher and Scott Bird, had been hired before the third strike began, and if they were, indeed, hired to serve as replacements, they were obviously intended as (unlawful) permanent replacements of striker participants in the second, unfair labor practice strike. Thus, Lilleberg claimed that Asher had been hired to permanently replace Matt Russell, a participant in the second strike, who I have found was an unfair labor practice striker who could not lawfully be permanently replaced. And Lilleberg claimed that Bird had been hired on or about September 7 to permanently replace a Burlington striker, although he could not recall whom Bird was intended to replace, and the record does not show precisely when Bird actually began working at Burlington. However, the participants in the second strike had unconditionally offered to return to work on September 7, and in any case, as unfair labor practice strikers, they could not lawfully be permanently replaced. Accordingly, Bird's hire cannot be treated as a lawful permanent replacement of a second-strike participant; much less could his September 7 hiring be practically understood as a replacement of any participant in the third strike, which had not started when Bird was hired.

[114] Lilleberg claims to have hired journeyman Burt Swift as a replacement for an unnamed Burlington striker (apparently Shepler, the only third-strike participant who was then assigned to Burlington). However, Swift's uncontradicted testimony shows that Lilleberg had his first interview, by telephone, with Swift on September 16 and did not tell Swift that he had a job at Burlington until September 17, at which time he told Swift to report to Burlington the following Monday, September 20. By September 17, however, Shepler and the other third-strike participants had already unconditionally offered to return to work.

On September 16, Shepler and the four Texaco-transferee strikers—Bonnickson, Martin, Blackwell, and Mike Russell—met at Local 191's offices, where they signed a common letter, addressed to Lilleberg, which said in material part, ''We unconditionally offer to return to work.'' Someone then faxed this letter to Lilleberg at the Woodinville office, at about 4:51 p.m., where it was admittedly received.[115]

On either September 21 or 22, Lilleberg called the five returnees individually, and told each that he had been permanently replaced. Although Lilleberg admittedly continued to hire electricians in the weeks and months after thus advising the returnees that they had been permanently replaced, he admittedly never sought out the returnees to offer them those opportunities.

b. *Analyses and conclusions of law regarding WestPac's treatment of the third-strike returnees*

I have found that Lilleberg's decision to transfer to Texaco four of the second strike returnees—Bonnickson, Martin, Blackwell, and Mike Russell—constituted both unlawful discrimination against them for their union activities in violation of Section 8(a)(3), and unlawful interference with their Section 7 rights to strike, in violation of Section 8(a)(1). It is clear, moreover, and I find, that Lilleberg's decision to transfer them rather than reinstate them at Burlington was a central factor motivating the decision of the four transferees to resume their strike on September 9. It is likewise clear, and I find, that Lilleberg knew that the four transferees were striking in protest of their transfer, for Mike Russell effectively explained this to him on September 9 by telephone, and Bonnickson told him on September 10 by telephone that the strikers were unconditionally willing to return to work ''at Fred Meyer in Burlington.'' (In addition, WestPac acknowledged the unfair labor practice character of the strike in its September 14 memorandum to employees, when it noted that ''several WestPac employees have chosen to stop work in protest of what they consider unfair practices.'') Finally, it is clear that Shepler joined the strike on September 13 out of ''sympathy'' for the four striking transferees. Given all this, I conclude that WestPac's unlawfully discriminatory transfer to Texaco of Bonnickson, et al., was a motivating factor in the third strike, and that all five participants in the third strike were unfair labor practice strikers.

This conclusion, in turn, requires certain additional conclusions regarding WestPac's treatment of the strikers: First, when WestPac published its September 14 memo stating that some or all of the third-strike participants had been ''permanently replaced,'' and even faced ''termination'' if WestPac were to determine that ''the work stoppages are not bona fide protected strike activity,'' it clearly committed an independent 8(a)(1) violation. *Decker Coal*, supra. Second, when Lilleberg eventually responded (after nearly a week's delay) to the unfair labor practice strikers' offer to return by telling them they had been permanently replaced, WestPac not only unlawfully denied them the immediate reinstatement they were entitled to as unfair labor practice strikers, but effectively ''terminated'' them.[116] Accordingly, I conclude as a matter of law that by telling the five unfair labor practice strikers by memo on September 14 that they had been permanently replaced, and by Lilleberg's refusing of reinstatement to them on that ground on or about September 22, WestPac in each instance violated Section 8(a)(1) of the Act.

With respect to Shepler's ''isolation'' assignment to the telephone room on and after his September 9 return to Burlington, I note, using a *Wright Line* analysis, that this facially appears to have been done, at least in part, for the same reason I have found that WestPac variously isolated returnees from the August 30 strike—to punish Shepler because he had struck and because he was an obvious IBEW adherent. Moreover, to the extent WestPac sought to rebut that prima facie inference by offering Engel's explanation for this assignment, Engel's explanation merely suggested yet another unlawfully discriminatory rationale for the assignment—that Shepler was singled out for the telephone room tasks because Engel feared he might strike again, and the telephone room work could easily be taken over by a nonstriker in that event. Accordingly, I conclude as a matter of law that WestPac violated Section 8(a)(1) and (3) by unlawfully discriminating against Shepler not only for his previous, protected union and striking activities, but also in anticipation that he would engage in more such protected activities in the future.

6. Discrimination against and termination of Hill and White at Texaco

a. *Introduction; credibility*

Paragraphs 12(c) and (d) of the complaint allege, in substance, that after Hill and White returned on September 9 from the second, September 3–7 strike, their superintendent, T. J. Nelson, ''isolated'' Hill from White and other coworkers, and did not give either of them the same work opportunities made available to the other members of WestPac's Texaco crew. Paragraph 13(c) of the complaint further alleges that in ''late September, the exact date unknown,'' WestPac ''terminated'' Hill and White.

There is much dispute (between Hill and White, on the one hand, and Nelson, on the other), about the treatment Hill and White received from Nelson in the period between their September 9 return from the second strike and their eventual departures from the Texaco job. I found Hill's testimony about pertinent events to be largely coherent, straightforward, and believable. White's testimony, although corroborative of Hill's as to events prior to September 14, was less coherent as to events after that date. I found Nelson to be a generally unimpressive witness concerning most of these events; his accounts were fundamentally marred by his tendency to re-

[115] My findings that the letter was signed at Local 191's office and faxed at 4:51 p.m. are based on information appearing on the fax transmittal sheet accompanying G.C. Exh. 19.

[116] In fact, as I have found, WestPac had not hired permanent replacements for all of the strikers as of their September 16 offers to return; at most, it had hired only two such alleged ''replacements,'' Sugg and Shaw, and then only for work at Texaco. To this extent, the permanent replacement message was a ''false'' one, and may independently be understood as an ''effective termination'' of the strikers within the meaning of *American Linen*, supra. It is clear in any case that the five participants in the third strike were ''terminated,'' and not just ''permanently replaced,'' for WestPac admittedly hired other electricians in the weeks and months after Lilleberg told the five they had been permanently replaced, and never offered any of those jobs to the former strikers.

spond with reckless generalities to questions that invited greater particularity, and they were frequently marred, as well, by his hopelessly contradictory or confusing narrations of the sequences of key events, especially those relating to Hill's and White's departures. I will rely primarily on Hill's accounts for my findings below, with marginal reliance on White's memory where it coincides with Hill's. I will place some reliance on admissions made by Nelson, and on data from WestPac's records, but I will not credit Nelson where his testimony conflicts with either HIll or White or any other witness.

b. *Facts*

(1) Background

Nelson had been running WestPac's work on Texaco's precipitator project since it started, in the third or fourth week of July. WestPac's work apparently involved installing the wiring, switches and electrical controls for the precipitator. Hill, White, and Jesse Anderson comprised the original crew of three hired by WestPac for this work, and all three had been on that job since at least early August. White was a certified welder, and his main job throughout his stint with WestPac was to weld brackets and ''unistrut'' channels on the sides of the tower structure, which would carry large, rigid, electrical, and conduit pipe. Hill was in the fourth year of his electrical apprenticeship in a state-licensed apprenticeship training program, and his main job was to form and install conduit in the channels that White had welded, and to pull high-voltage wiring through those conduits. Anderson, apparently a journey-level electrician, worked with the tools, but apparently served also as a leadman. Hill and White were personal, off-the-job friends. On the job, too, they were accustomed to working together; for example, as White welded new channels, Hill would install new conduit in those channels. White would also help Hill stage this conduit for installation.

Off the job, Hill and White were also personal friends and fishing buddies of Shepler, but neither was a member of any union at the time they joined the second, September 3–7 strike. After that strike, however, on September 16, Hill became a member of Local 191. So far as this record shows, neither Hill nor White had been the targets of any organizing activity or other contact by agents of the Unions prior to the time they joined the second strike on September 3. Instead, to the extent it may matter, their testimony shows simply that their joining of the second strike was based on their personal unwillingness to work behind a picket line.

(2) Isolation of Hill

Upon Hill's and White's Thursday, September 9 return, Nelson assigned electrician Hill to work alone on various tasks at the bottom of the precipitator, while welder White and the rest of the electrician crew continued to perform tasks at or near the top of the structure, where Hill had been working immediately before the strike. On September 9 or 10, Hill asked Nelson why he was ''down at the bottom when everybody else was running conduit on the top that [Hill] had laid out.'' Nelson explained that he ''didn't want [Hill] around the rest of the employees,'' because they had ''hard feelings'' towards Hill. Nelson, although denying this version (which denial I don't believe), more generally testified that nonstriking employees did, in fact, harbor such hard feelings towards Hill as a striker.

(3) Denial of work opportunities to Hill and White

The record is more than a little confusing about some aspects of Hill's and White's hours and assignments. As I further explain below, the record appears to show that White worked his last full day for WestPac at Texaco on Monday, September 13, only his third day of work after he had been reinstated, and that if he worked at all after September 13, it was only for 1 hour on September 20. The record also appears to show that Hill worked his last full day on Tuesday, September 21. However, it further appears that Nelson did not plainly announce his intention to lay off either Hill or White from the Texaco project until Monday, September 27. As I show below, however, the record clearly reveals that during the period between September 9 and 27, the nonstriking members of the WestPac/Texaco crew, augmented by two new hires on September 13, regularly worked long hours without interruption.

There is no question that Hill and White were not offered weekend work on the first weekend after their September 9 return, i.e., on Saturday, September 11, or on Sunday, September 12, even though the nonstriking members of the (now-enlarged) WestPac/Texaco crew each worked 10 or 11 hours on each day of that weekend.[117] The only question is why Hill and White were denied work on that weekend. Hill's testimony, which I credit, suggests the most obvious answer: Thus, from Hill, I find that on Friday, September 10, Hill saw some kind of writing on Nelson's desk listing employees who were scheduled to work on Saturday and Sunday. Hill asked Nelson why his and White's names weren't on that list. Nelson replied, ''Because those people [on the list] want to work.'' Although Nelson denied saying this to Hill (which denial I don't believe), he otherwise appeared to be trying to explain his failure to assign Hill and White to weekend work for essentially the same reason that I find he announced to Hill on September 10—that only the nonstrikers were seen by WestPac as ''want[ing] to work.'' Thus, Nelson claimed in wholly generalized terms that Hill and White, throughout their employment since late July, had records of excessive absenteeism. I note, however, that WestPac did not seek to corroborate this claim—for example, by introducing Hill's and White's time and attendance records during their prestrike months of employment.

[117] Thus, As Nelson acknowledged, WestPac's time records show that Hill and White did not work on Saturday, September 11, or Sunday, September 12, whereas other members of the crew (specifically, Jesse Anderson, Russell Long, Peter Ottele, and Terry Raines) each worked 10 or 11 hours on each of those days. In addition, Nelson acknowledged that the time records showed that WestPac had brought in workers from other WestPac projects for that weekend work. One of these was Dave Ballas, normally employed at the Woodinville shop as a welder, who was brought in to do welding work on September 11 that White would have otherwise performed. In addition, the parties stipulated that two relatives of current managers, Mark Lilleberg Sr. and Ted Chrisman (himself a superintendent), were brought in to do rank-and-file work on both September 11 and 12. Moreover, the parties stipulated that Project Manager LaRoche himself ''perform[ed] electrician duties'' at Texaco on September 11.

On Monday, September 13, two newly hired workers, Sugg and Shaw, started working at Texaco. Sugg had worked years earlier for Lilleberg in the nonunion Telon operation, but he had moved to Louisiana in the meantime. While Sugg may have had journey-level experience (in fact, the record is silent on this point), he had only recently returned from Louisiana, and Nelson admitted that he had no Washington journeyman's license when he appeared on the site. Nelson further admitted that Shaw, a friend of Sugg from Louisiana, had no journey-level experience, nor was he then registered in a state-qualified apprenticeship program. As I discuss next, it appears that the arrival of Sugg and Shaw on the site left WestPac in an out-of-ratio posture, and that WestPac dealt with this by further reducing Hill's and White's work opportunities.

On the morning of Tuesday, September 14 (as Hill testified and Nelson appeared to agree), a state electrical inspector cited WestPac for working out-of-ratio at Texaco. Nelson then sent Hill and White home, explaining that this was to bring the crew back into proper ratio. However, he permitted new hires Sugg and Shaw and the rest of the regular crew to remain. On September 15, Hill reported to work, but was again sent home by Nelson for some reason relating to a skewed ratio problem. White had not been called back at all for work on September 15, nor on September 16 (nor, in fact, at any point after he was sent home on the morning of September 14). When Hill returned on September 16, Nelson told him they needed a welder, and instructed Hill to go into Anacortes, take a welding test, and return with a certification. (Nelson knew that Hill had welding experience from his earlier work for another contractor at the Texaco site.) Hill left the site, took the test and passed it, and WestPac paid the $373 cost of the test. Upon Hill's return later that day, Nelson assigned him to welding work that White would have normally performed. Seeking to explain this decision, Nelson testified, in substance, that he had been getting ongoing and repeated complaints about White's sloppy welding technique from Texaco agents. Again, however, WestPac made no attempt to corroborate Nelson's generalized claims.

As Nelson acknowledged, WestPac's timesheets for the pay period Monday, September 13, through Sunday, September 19, show that the other Texaco crewmembers (save Ottele, who quit in midweek, to return to school) worked more than 70 hours each during that week, including on Saturday and Sunday, September 18 and 19.[118] Those records also show that, just as on the previous weekend, WestPac brought in Mark Lilleberg Sr. and Ted Chrisman from other projects to perform work at Texaco on September 18 and 19.

It appears from the foregoing that Hill and White, alone among the regular Texaco crew, were sent home on September 14; and that Hill was again sent home on September 15 when he appeared (without White) ready for work. It also appears that Hill, but not White, was permitted to return on September 16. Exactly what happened to both Hill and White after September 16 is somewhat less clear. From Hill's account, it appears that Hill next was called-in for work on Saturday, September 18, but White was not. Nelson gave Hill a welding assignment on that Saturday, at the bottom of the precipitator tower. Nelson and Hill agree that Texaco's rules and applicable safety codes require that each refinery welder must work with another employee who serves as a ''fire watch.'' When Hill asked Nelson for a fire watch, Nelson advised him to use the worker who was performing that task for another contractor's welder at the top of the tower. Hill protested that this would be unsafe because ''they were on the top and I was on the bottom.'' Nelson then advised Hill to try to locate someone else until Nelson himself could take over the fire watch duty. Hill was not able to find anyone for that duty, and after about an hour or so of welding, and after Nelson did not return, Hill told someone on the tower that he was leaving, whereupon he went home.

Crediting Hill, I find that that he and White next appeared at the site on the morning of Monday, September 20, at which time Nelson again sent them home because of an out-of-ratio problem, even though Sugg and Shaw and others were permitted to remain. Hill returned to work on September 21, but White did not. WestPac's records tend to corroborate Hill.[119] On September 22, both Hill and White traveled together to the wedding of a mutual friend in Reno. Crediting them, I find that they had arranged with Nelson weeks earlier to be away from work on Wednesday, September 22 through Friday, September 24. (Although Nelson recalled instead that this trip was supposedly for the purpose of Hill's delivering a truck to a relative in South Dakota, he agreed that he had given permission for the two men to be absent during this 3-day period; accordingly, it doesn't matter where they went.) I further credit Hill that both he and White told Nelson before their departure on this trip that they would be back in time for weekend work on September 25 and 26, and that Nelson should call them if such work was scheduled. Nevertheless, neither Hill nor White was called for any weekend work on September 25 and 26, even though the summary of WestPac's timesheets for that week (G.C. Exh. 47) shows that new hires Sugg and Shaw worked on that Saturday, as did one other Texaco regular, Anderson, as did Adam Chrisman, who was again imported for that work from his regular job at another WestPac site.

I credit Hill and White about what happened thereafter, as follows: Hill and White both appeared at the site on the morning of Monday, September 27, but Nelson told them both to go home, again because of some ratio problem. This time, however, Nelson also told them that they should stay at home and wait for a call for any further work. White received no further call thereafter from any WestPac agent. Hill, however, called Nelson later on September 27, and asked Nelson if he had been ''terminated.'' Nelson said no, and then told Hill that he was ''going to ship [Hill] over to Fred Meyers,'' in Burlington, and instructed Hill to await a

[118] Thus, Nelson, reading from WestPac's time records, agreed that during the week in question, Anderson worked 76 hours; Sugg and Shaw each worked 72 hours, and Long and Raines worked 70 hours, and that all of them had worked on Saturday and Sunday. Moreover, although Ottele worked far fewer hours in the same week, this was because, as Nelson admitted, he quit to return to school in the middle of that week, on or about September 16.

[119] Thus, a summary of WestPac's time records for that week (G.C. Exh. 47) shows that White was credited for ''1 hr.'' of work on Monday, September 20 (but for no further hours that week), and that Hill was credited for a total of ''9 hrs.'' for Monday and Tuesday of that week (but for no further hours that week). The most likely explanation for this is that both White and Hill received credit for 1-hour's ''show-up'' time on Monday, September 20, before they were sent home, and that Hill worked another 8 hours on Tuesday, September 21, as he testified.

call from the Burlington ''foreman.'' Crediting Hill, I find that sometime later in the week, Engel called him and offered him a 1-day job at Burlington on Saturday, ''pulling wire.'' Hill asked, ''What about the rest of the time.'' Engel replied, ''I just need you for Saturday.'' Hill declined, saying he didn't want to come in ''for just one day.'' He never got any further calls. (Strikingly, although Nelson specifically testified that he had worked out an arrangement with Engel whereby Hill would transfer to Burlington and work there regularly, Engel insists instead that he turned down Nelson's suggestion on the ground that he was already out-of-ratio at Burlington and could not justify having another apprentice on that site. Considering all the evidence, I find that Nelson had no definite arrangement with Engel to ''transfer'' Hill to Burlington; rather, I find that after sending Hill home on September 27, Nelson had simply advised Engel of Hill's availability for future work, and Engel, concerned about working out-of-ratio, had simply invited Hill to work a single day's stint at Burlington on a Saturday, when, as Engel apparently judged, Hill's appearance would not create a ratio problem.)

Finally, Nelson admits, General Counsel's Exhibit 41 shows, and I find, that, as of September 27, there remained a considerable amount of WestPac work still to be done at the Texaco project, work that continued to be performed by other WestPac/Texaco regulars, plus new hires Sugg and Shaw, at least through the payroll period ending on October 24. (See G.C. Exh. 41.)

c. *Analyses and conclusions of law regarding WestPac's postreinstatement treatment of Hill and White*

(1) Isolation; reduced work opportunities prior to September 27

WestPac's patterns of behavior are by now too familiar to require extensive recapitulation or interpretation: It is clear from the foregoing findings that, after WestPac purported to ''reinstate'' Hill and White, it did roughly the same things to them that it did to the returning Burlington strikers. Thus, (a) it separated Hill and White from each other; (b) it barred Hill and White from weekend work opportunities on September 11 and 12 and on September 25 and 26;[120] and (c) it gave new hires Sugg and Shaw and the nonstrikers a kind of ''superseniority'' for purposes of preference for retention when someone had to be ''sent home'' to correct an out-of-ratio configuration—a ratio problem, moreover, that appears to have been occasioned by the very introduction of Sugg and Shaw into the Texaco crew.[121]

These plainly discriminatory actions on WestPac's part are properly understood in the first instance as a violation of WestPac's duty to treat Hill and White ''uniformly with nonstrikers and permanent replacements,'' *NLRB v. Transport Co. of Texas*, supra. Therefore, they may be found to have violated Section 8(a)(1) and (3) without regard to WestPac's actual motives for such discriminatory treatment. If, however, WestPac's actual motives were a relevant subject for inquiry in this context, I judge that the General Counsel made a prima facie case that Hill's and White's protected striking activities were a ''motivating factor'' for WestPac's actions against them. Thus, apart from more general evidence of WestPac's hostility to and discriminatory treatment of strikers and other employees believed to be IBEW-associated, the credited evidence shows that Nelson effectively told Hill he was being separated from the rest of the crew because he was a striker, and because the nonstrikers had ''hard feelings'' against him for that reason. (In the circumstances, I conclude as a matter of law that Nelson's explanation for giving Hill an isolation assignment violated Sec. 8(a)(1).[122]) The credited evidence also shows that Nelson told Hill that the nonstrikers on the crew were being assigned to weekend work because they, unlike Hill and White, ''wanted to work.'' (In the circumstances, I find that this remark to Hill was intended to communicate the message that, in WestPac's eyes, an employee's participation in a strike was equated with an unwillingness to work; therefore, I conclude as a matter of law that this remark likewise violated Sec. 8(a)(1).) Accordingly, given these prima facie indications of unlawful motive, I judge that the burden shifted to WestPac to demonstrate that it would have isolated Hill and reduced Hill's and White's work opportunities after their reinstatement even if they had not been strikers.

WestPac made no attempt to meet a *Wright Line* burden regarding the isolation of Hill; it merely invited Nelson to deny that he had done so, or had told Hill that he was being thus isolated because of the ''hard feelings'' harbored against him by the nonstriking crewmembers. I have discredited Nelson on these points; therefore, the General Counsel's evidence of unlawfully motivated isolation stands unrefuted. As to the decisions to send Hill and White home to correct ratio imbalances, and to rule them out for weekend work made available to the others, the only attempt made by WestPac to meet its *Wright Line* burden was to offer Nelson's claim to the general effect that Hill and White had records of excessive absences and appeared not to be interested in all the work opportunities made available to the others. However, Nelson's testimony was too generalized to deserve literal credence, and it suffered moreover from lack of corroboration. Indeed, where WestPac failed to corroborate Nelson's generalized slurs against Hill and White (for example, by the introduction of prestrike time and attendance records for them and other Texaco crewmembers), the appropriate inference to draw is an adverse one—that, if produced, such evidence would have contradicted Nelson's generalized claims. *Auto Workers v. NLRB (Gyrodyne Co.)*, 459 F.2d 1329, 1336–1337 (D.C. Cir. 1972).

[120] It also barred White from weekend work on September 18 and 19, and, although Hill was called-in for welding work on September 18, the assignment he received was again an isolated one.

[121] Although Lilleberg claimed that he hired Sugg and Shaw as ''permanent replacements'' for intended Texaco transferees Bonnickson and Martin, supra, I think the reality is that Lilleberg intended that Sugg and Shaw would supplant Hill and White—despite the fact that Hill and White, having returned on September 9, could not have been lawfully ''replaced'' by Sugg and Shaw, even if Hill and White had been ''economic'' strikers, rather than the unfair labor practice strikers I have found them to be.

[122] Although I find from Hill that Nelson effectively admitted that Hill's assignment to the bottom of the tower was linked to his having been a striker, I do not accept any suggestion in Nelson's testimony that it was the nonstrikers' ''hard feelings'' against strikers, as distinguished from WestPac's own animus against strikers, that accounted for Hill's isolation assignment.

Accordingly, I remain unpersuaded that WestPac would have given the same treatment to Hill and White absent their protected striking behavior, and I conclude as a matter of law that by isolating Hill, and by failing to give them the same work opportunities made available to the nonstrikers and new hires, WestPac in each instance violated Section 8(a)(1) and (3) of the Act.

(2) September 27 final ''layoff'' of Hill and White

Hill: It seems clear, and I find, that when Nelson sent Hill and White home for the last time on August 27, he intended to signal to them that he had no more work for them at Texaco. Any suggestion by Nelson that Hill ''quit'' in these circumstances is clearly far fetched, for Nelson admits that the only possibility of work he held out to Hill thereafter was not work at Texaco, but a ''transfer'' to Engel's crew at Burlington. I have found that Nelson did not, in fact, arrange with Engel for Hill's transfer to Burlington. It is equally clear that the only work offered by WestPac to Hill thereafter was Engel's offer of a 1-day job at Burlington on a Saturday. Most importantly, however, it is clear that at least a month's worth of work remained to be done at Texaco for which Hill was eminently qualified. Having found that WestPac had been unlawfully and discriminatorily minimizing Hill's work opportunities in the previous weeks, I have little difficulty finding that WestPac operated from similar unlawful motives when Nelson effectively laid Hill off from the Texaco project on September 27.[123] I can detect nothing in WestPac's evidentiary presentation that purports to meet its *Wright Line* burden in the circumstances—to show that Hill would have been laid off from Texaco on September 27 even absent his protected striking activities. Accordingly, I conclude as a matter of law that when Nelson thus laid off Hill, WestPac further violated Section 8(a)(1) and (3) of the Act.

White: I reach similar conclusions with respect to White's effective layoff. However, in White's case, it appears that his ''layoff'' occurred for practical purposes as early as the end of the day on Monday, September 13, his third day of work since his return from the strike, and the last day that he was actually allowed to work a full shift. (As I have noted, supra, White's only work credit after that date was for 1 hour, on Monday, September 20, which was apparently intended as ''show-up'' time before Nelson sent both Hill and White home that day, based on claimed ''ratio'' problems.) Thus, for practical purposes, I find that WestPac dispensed with White's services only a few days after it had purported to ''reinstate'' him pursuant to his unconditional offer to return. Again, there is no doubt that the General Counsel established a prima facie case that White's protected participation in that strike was a motivating factor in his layoff from the Texaco job, no matter whether that layoff occurred on September 14 or 27, or on some date in between. Again, the only attempt by WestPac to meet its rebuttal burden under *Wright Line* came through Nelson's generalized and uncorroborated claim that White could no longer be used as a welder because of supposedly repeated and ongoing complaints from ''Texaco'' about his sloppy welds. I do not credit Nelson on this point. This explanation again lacked corroboration, and it is inherently dubious that, having tolerated White's supposedly substandard work for several months before the strike, Nelson would have been inspired by those reasons alone to remove White from welding work only a few days after White returned from the strike. Rather, on the credited record as a whole, I deem it more probable than not that when Nelson took White off welding work, he was simply implementing Lilleberg's vow, declared early on in Duncan's presence, to ''get rid of the people who were in the union,'' but to do this in a way that ''would be less suspicious, less noticeable,'' by ''lay[ing] them off slowly, gradually, not all at once.'' The complaint does not specifically allege that Nelson's removal of White from welding work was an act of unlawful discrimination. Nevertheless, on a fully litigated record, I find that it was, for the reasons just noted.[124] Accordingly, I conclude as a matter of law that when Nelson effectively ceased using White's services after September 13, WestPac violated Section 8(a)(1) and (3) of the Act.

[123] Because of this, it is clearly irrelevant to the violation that WestPac later offered, and Hill declined, a 1-day job at Burlington.

G. *October 8 Layoff of Ken Jennings*

1. Facts

As I have found in greater detail previously, Ken Jennings[125] was an apprentice electrician with no IBEW ties when, on July 28, Lilleberg hired him, assigned him to the Eagle-Puyallup job, and assured him that there would be ''no problem'' with his expressed wish to remain employed by WestPac ''through the winter . . . full time.'' Nevertheless, as everyone agrees, his last day of work for WestPac proved to be Friday, October 8, as the Eagle-Puyallup job was being completed, and under other circumstances described below.

Jennings' overall work history is essentially undisputed: He first began working for WestPac on July 30, as an inside wireman at the Eagle-Puyallup site, under Superintendent Johnston, himself a part owner of WestPac and one of Lilleberg's former associates in the nonunion Telon operation. (Jennings' brother, Dave Jennings, was also hired soon thereafter by Johnston for trainee-level work at the same site.) Jennings has backhoe experience, and sometime in late August, he was transferred to WestPac's job for Northwest Metals in nearby Fife (Northwest-Fife), where he did backhoe trenching for nearly a month, until the one part of the undergrounding phase was completed, after which the electrical job would be interrupted until the slab floor was down and the walls and roof were in place. It was during his back-

[124] Nelson testified that he offered White the job of serving as a ''fire watch'' at some (undefined) point after removing him from the welding job, but that White declined this offer. White's testimony, which occurred before Nelson's, contains no specific contradiction of Nelson's claim in this respect, and the General Counsel did not recall White at the rebuttal stage to contradict Nelson's claim. Accordingly, absent any contradiction from White, I cannot confidently reject Nelson's claim out of hand. However, Nelson never identified when this alleged offer to White of a fire-watch position occurred, and his overall accounts of sequence and timing were too vague or contradictory to permit a finding on the point. In the circumstances, assuming, arguendo, that Nelson was truthful when he claims to have offered White the option of working as a fire-watch, and was likewise truthful in claiming that White declined this offer, these assumed facts would not cure the unlawfully discriminatory character of White's removal from welding work, they might only have impact on the amount of backpay due to White, a question I do not decide.

[125] Ken Jennings has a brother, Dave Jennings, who also figures in these events. Hereafter, ''Jennings'' refers to Ken.

hoe stint at Fife that Jennings' superintendent, Adam Chrisman, told Jennings that the Burlington strikers would be ''let go,'' or ''fired,'' and that Lilleberg would sooner close the doors than let the union get in. Crediting Jennings, I find that it was likewise during this stint that he began to meet regularly at an establishment called Pietro's with other IBEW members and with Tacoma Local 76 organizer Grunwald. As a consequence, Jennings became an IBEW supporter, and began to sport an IBEW button on his shirt, which he continued to wear when, later in September, he returned to the Eagle-Puyallup site.

Crediting Jennings, whose account is roughly harmonious with Johnston's, I further find as follows: In late September, Johnston asked Jennings why he had not appeared to begin a WestPac-arranged, nonunion apprenticeship training course. Jennings, who was wearing an IBEW button at the time, said that he had signed up with an IBEW-affiliated apprenticeship program instead. Johnston asked why Jennings ''went that route''; Jennings replied that the union-sponsored course seemed to offer him ''more opportunity, training-wise.'' Johnston countered that Jennings was ''throwing an opportunity away, because Steve had given other guys in the company the same opportunity he had given me, and they were running jobs now.''

Jennings and Johnston agree, and I find, that, by early October, the Eagle-Puyallup job was nearing completion, and WestPac workers were being transferred to other jobs. Relying on Jennings' uncontradicted recollection of the particulars, I further find as follows: On Friday, October 8, Jennings came to work wearing a T-shirt bearing an IBEW logo. Shortly before lunchtime on that day, Johnston told both Ken and Dave Jennings that this would be their last day at that site, and that they should call Lilleberg for any possible new assignments. Jennings called Lilleberg from the job trailer, and eventually reached him away from the office on his cell phone. Lilleberg told Jennings that WestPac had gotten approval to do some more work at Northwest-Fife, and that he should report there Monday, October 11, at 7 a.m., to perform additional backhoe work. Jennings agreed, then turned the phone over to his brother. Lilleberg then told Dave Jennings that there was nothing immediately in store for him, but that he should sit at home for a few days and await further possibilities.

Jennings further testified, however, that at about 2 p.m. on October 8, he visited the job trailer and found Project Manager Coers seated inside with Johnston. Jennings testified that Coers told him that ''there was a change in plans, and they couldn't get into Northwest Metals, and that [Jennings] should do the same thing that Dave was doing, taking a couple of days off until they could find a place to put [him].'' Thus, according to Jennings, Coers effectively countermanded the understanding admittedly shared by all until that point—that Jennings would transfer on Monday to Northwest-Fife. Strikingly, neither Coers nor Johnston was invited to specifically comment on, much less to deny, Jennings' testimony in this particular respect. I regard Jennings' testimony on this point as highly significant, if true, and I have looked at it critically, mindful of other facts that raise at least some doubt about the likelihood that Coers would have issued such a countermanding order.[126] But after considering all the known or alleged surrounding circumstances, I am finally moved to credit Jennings on the point because percipient WestPac agents did not contradict him. Thus, relying on Jennings, I find that the last word Jennings heard on the subject of a possible transfer to Northwest-Fife was Coers' instruction at 2 p.m. countermanding such a transfer, at least for a ''couple of days.''

Crediting Jennings' undisputed testimony, I further find as follows: On the following Monday, October 11, Jennings got a call from Johnston in the morning; Johnston asked Jennings if he ''wanted to come in and work that day up at the Eagle store,'' to do some wrap-up work. Jennings declined the offer, saying that he had planned in the meantime to use his ''couple of days off'' to take care of some last-minute appointments connected with his wife's pregnancy and imminent delivery. He then turned the phone over to his brother, who agreed to come in when Engel made the same offer to him. Crediting Dave Jennings, I find that while Dave was at the Eagle-Puyallup site that day, Johnston asked where his brother was. Dave told him that as far as he knew, Ken was sitting at home because he had been told to take a couple of days off. Further crediting Dave Jennings, I find, contrary to Johnston's testimony, that Dave never told Johnston that Ken had taken a new, ''union'' job.

Also relying on Jennings' undisputed account, I find that on that same Monday, October 11, Jennings tried several times to call Lilleberg at the office, but Lilleberg was not available. The next day, Jennings tried again several times to reach Lilleberg, and finally made contact with him either that afternoon, or the morning of Wednesday, October 13. During this call, Lilleberg told Jennings that he had ''run into some problems, and it would be a couple of weeks before they'd have anything.''

Everyone agrees about the aftermath of these events: Jennings never got any further calls from Lilleberg or any other WestPac agent, despite the fact, acknowledged by Northwest-Fife superintendent Adam Chrisman, that WestPac's work resumed at Northwest-Fife about a week later (i.e., in the week beginning Monday, October 18). Chrisman further conceded, and I find, as follows: There remained an ''extensive amount of work'' left to do at Northwest-Fife, both undergrounding and interior wiring. It had been Chrisman's understanding that Jennings was to do the backhoe work associated with the undergrounding, and, upon the completion of that work, he would then have been brought inside to assist with the inte-

[126] For example, WestPac's superintendent for the Northwest-Fife project, Adam Chrisman, testified that he showed up at Northwest-Fife on Monday, October 11, expecting to resume work there, only to find no one from WestPac on the site, whereupon he called-in and was instructed to return to his by then regular assignment at Texaco-Anacortes, where he was performing rank-and-file electrical installation work. (As I further discuss below, Chrisman also testified that the work at Northwest-Fife site resumed in earnest about a week later.) Thus, if Coers indeed told Jennings on Friday afternoon that there had been a ''change,'' and that WestPac could not ''get in'' to resume work at Northwest-Fife for at least a couple of more days, it is odd that this message never reached Chrisman's ears before he arrived at the site on Monday. Nevertheless, Chrisman's testimony is not inherently incompatible with Jennings' claim now in question, and I regard it as substantially more odd that WestPac never invited Coers or Johnston to deny Jennings' claim.

rior wiring phase. However, in Jennings' absence, Chris Lilleberg did all the backhoe work instead.

2. Analysis and conclusions regarding Jennings

Jennings presented himself to Johnston and Lilleberg in late July as a nonunion apprentice electrician who could operate a backhoe. Lilleberg hired him for the Eagle-Puyallup project, and implicitly assured him that he would be given opportunities for additional work even after that project was completed, indeed, through the winter months. In his final month with WestPac, spanning the period of his backhoe work at Nothwest-Fife and his return to Eagle-Puyallup, Jennings became ever more visibly associated with the IBEW. Johnston admittedly knew about Jennings' emergence as an IBEW supporter, and I have found that when, in late September, he questioned why Jennings had decided to take an IBEW-sponsored apprenticeship program instead of the nonunion program WestPac had arranged, he also opined that Jennings was ''throwing an opportunity away,'' clearly implying with additional words that Lilleberg was prepared to reserve ''opportunities'' only for those workers who did not ''go [the IBEW] route'' that Jennings had evidently chosen. Consistent with the allegation in complaint paragraph 8(c), I conclude as a matter of law that when Johnston said this to Jennings in the latter part of September, WestPac violated Section 8(a)(1) of the Act.

While it is clear that by October 8, WestPac's work was indeed drawing to a close at the Eagle-Puyallup project, it is equally clear that there remained an extensive amount of exterior backhoe and related undergrounding work and interior wiring work to be done at the Northwest-Fife site. I have found—and WestPac indeed insists—that this transfer ''opportunity'' was held out to Jennings by Lilleberg after Johnston advised him on October 8 that there would be no more work for Jennings at Eagle-Puyallup. I have further found, however, that at about 2 p.m. on the afternoon of October 8, Coers advised Jennings that there had been a ''change'' in plans necessitating a delay before work at Northwest-Fife could resume. I have also found that Lilleberg told Jennings on or about October 12 that ''some problems'' had developed that would leave Jennings without any further work opportunities for at least a ''couple more weeks.'' WestPac nevertheless concedes that the Northwest-Fife project was resumed no more than a week later, and that Chris Lilleberg, not Jennings, was tagged to do the backhoe work that Jennings would otherwise have done.

The foregoing findings alone, without regard to the overarching extrinsic evidence of Lilleberg's antiunion animus and his apparent determination to cleanse WestPac of any traces of IBEW presence, make out a prima facie case that Jennings' emergence as an IBEW supporter was a motivating factor in WestPac's apparent decision to snatch away the opportunities for further work that its agents had once held out to Jennings. In the circumstances, to escape liability for this apparent violation of Section 8(a)(3) and (1), it fell to WestPac to demonstrate that Jennings would have received the same treatment even absent his protected associations and activities. WestPac explains its failure to call Jennings for the work that resumed at Northwest-Fife or for any further work thereafter on the ground that Jennings ''quit.'' I note that WestPac produced no witness who claimed to have heard Jennings say that he had quit; rather, Johnston claimed only that he assumed that Jennings had quit because (a), he failed to show up at Northwest-Fife on October 11, and (b) Jennings' brother Dave some days later told Johnston that Jennings had taken a ''union'' job. I have found that Jennings did not show up for work at Northwest-Fife on the 11th because Coers eventually told him on October 8 to stay home instead, due to a change in the planned timing of WestPac's resumption of that project. I have also discredited Johnston's claim that Dave Jennings told him that Ken Jennings had taken a union job. I have found instead that Dave Jennings effectively told Johnston that his brother was at home, waiting for a call from WestPac for another assignment. Therefore, I remain unpersuaded that WestPac's agents had any legitimate grounds for believing that Jennings had either quit or had otherwise renounced his interest in further employment.

Accordingly, where WestPac has failed to refute the General Counsel's proof of wrongful motivation, I conclude as a matter of law that WestPac violated Section 8(a)(3) and (1) by effectively terminating Jennings on October 8.

H. *Miscellany*

1. Lilleberg's threat to Gary Falvey

Relying on the credible testimony of witness Gary Falvey, and disregarding any contrary testimony by Lilleberg, I find merit to complaint paragraphs 10(c) and (d), which substantially allege in the aggregate that in ''mid-September,'' Lilleberg unlawfully ''directed [an] employee not to talk about the Union[,]'' and ''threatened an employee with unspecified reprisals if the employee engaged in Union activities.'' Falvey's credited testimony shows as follows: When Falvey applied for a job with WestPac and interviewed with Lilleberg on or about September 2, Falvey disclosed that he was a native of the Irish Republic and had gotten his electrical experience in that country. Lilleberg replied that, ''in America,'' there were both ''union and nonunion shops,'' that WestPac was ''nonunion,'' but that it hired people of ''both religions.'' Later, on September 15, shortly before the third strike was concluded, Lilleberg called Falvey at home and offered him a job, but said, ''If I see a picket sign in your hands, you're no friend of mine.'' I conclude as a matter of law that Lilleberg's September 15 remarks to Falvey violated Section 8(a)(1) of the Act.

2. Alleged unlawful surveillance by Johnston

I find no merit to complaint paragraphs 8(a) and (b), which substantially allege in the aggregate that on August 23 and September 1, Johnston engaged in unlawful ''surveillance'' of Eagle-Puyallup employees as they met on or near the jobsite with visiting IBEW agent Freese. The record shows that on both occasions (just as on other occasions when other IBEW agents visited jobsites), the employees and Freese met openly and in plain view of Johnston. Indeed, on the first occasion, when Freese was meeting with a group of employees just outside Johnston's trailer, Johnston did not merely ''observe'' these activities, but walked into the group and demanded that Freese leave the site, just as he had done on an earlier occasion when Grunwald came to the site. And on the second occasion, when Freese and a group of employees were meeting just outside the site perimeter in an employees' car, the most that the testimony shows is that John-

ston paused more than once and briefly stood with hands on hips and looked in the direction of the group. Contrary to the hyperbolic characterizations of these incidents in the General Counsel's brief (pp. 82–83), I find no palpable evidence that Johnston engaged in any inherently ''suspicious behavior,'' or ''untoward conduct'' that might suggest that he was spying. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159 (1992). The General Counsel's reliance on *Kosher Plaza Supermarket*, 313 NLRB 74, 86 (1993), is seriously misplaced. There, unlike here, the conduct found to amount to unlawful surveillance involved an employer agent who ''followed'' a car occupied by two prounion employees ''for well over an hour,'' and who ''talked into a walkie-talkie'' when the employees stopped at a bar. Accordingly, I will dismiss the allegations in paragraphs 8(a) and (b) of the complaint.

3. Lilleberg's ''forcibl[e] evict[ion]'' of Freese on September 10

I find no merit to paragraph 10(b) of the complaint, which alleges that, on September 10, Lilleberg unlawfully ''forcibly evicted Union representative and job applicant Jim Freese from its office facility in view of several applicants and employees.'' In my narration of facts at section F,5,a, supra, I found that on September 10, the participants in the second strike traveled to Woodinville, where they met with Freese and Grunwald and picketed at the end of WestPac's driveway, and that Freese entered the office and obtained a copy of the new application form before Lilleberg appeared and ushered him out the door and down the driveway. I also noted previously that Freese's mission does not appear to have been directed so much at applying for work than at getting a specimen of WestPac's newly introduced, six-page application form. These are some details I omitted from that narration:

Freese's testified, in substance, as follows: When Freese entered the office and got an application form, Lilleberg appeared and said that if Freese wanted to fill out an application, he was to do it off the premises. Lilleberg then began to guide Freese from the office with his hand at the small of Freese's back, and then escorted Freese with similar manual coaxing back out the length of the driveway, occasionally ''pushing'' Freese and causing him to lose balance and to ''stumble'' at intervals, in the presence of the waiting pickets. I have strong doubt about Freese's claim that Lilleberg pushed him in such a way as to make him stumble. I note that Martin, the only other prosecution witness whom the General Counsel invited to describe this aspect of the event, testified that he did not get the ''impression'' that Freese ''was being pushed, or anything like that.''

The General Counsel does not claim that Freese's ''eviction'' was itself unlawful. Rather, on brief (p. 86), citing *Horton Automatics*, 289 NLRB 405, 411 (1988), the General Counsel argues that, ''[w]hile it might not ordinarily be a violation . . . for an employer to shove, push, or escort a union representative off his property, it becomes violative where . . . [employee] onlookers could likely infer that the employer would also treat them in like fashion because of their support for the union.'' In *Horton*, supra, the judge was confronted with what he termed an ''assault'' by an employer agent on a union agent which took place off the employer's premises, and which clearly involved more aggressive and offensive physical confrontation than Freese's description would support; and in that context, the judge found it reasonable to suppose that the onlooking employees would legitimately infer that they would receive similarly aggressive ''retaliat[ion]'' for their support of the union. 289 NLRB at 410–411. In my judgment, *Horton's* application of a familiar theory of an 8(a)(1) violation when an employer physically ''assaults'' a union representative outside the employer's premises does not apply where, as here, the General Counsel implicitly concedes that Lilleberg had a right to evict Freese, and Lilleberg's escorting of Freese off the premises was unaccompanied by anything more than mild physical contact between Lilleberg's hand and the small of Freese's back. Accordingly, I will dismiss paragraph 10(b) of the complaint.

VI. THE REMEDY

I have found that WestPac variously discharged and otherwise discriminated unlawfully against a total of 11 of its employees (Jim Scott, Craig Skomski, and Ken Jennings, plus the 8 strikers—Jim Shepler, Mike Russell, Matt Russell, Jim Martin, Dave Bonnickson, Gregg Blackwell, Mike Hill, and Danny White) because they engaged in pro-IBEW activities, and/or because they participated in strikes or other concerted activities for their mutual aid and protection on the job. I have further found that WestPac unlawfully refused to hire or consider for hire a total of 29 other applicants for jobs with WestPac (including Marty Aaenson, Randy Allen, John Fraine, Mike Grunwald, Ross Inglis, Joseph Sumrall, James Thompson, John Thornton, David Wagster, and Wayne Wright, plus the 19 other persons previously listed who submitted applications en masse on September 20 and 27)—again because of their known or perceived associations with or organizing intentions on behalf of the Unions. I have further found that WestPac's agents engaged in numerous and apparently systematic acts of unlawful interrogations of and threats against employees concerning their exercise of their Section 7 rights. Because of this record of widespread and egregious unlawful conduct, I find it necessary to issue a broad Order, requiring WestPac not just to cease and desist from ''like or related'' acts of misconduct in the future, but to cease and desist from in ''any other manner'' infringing on employee rights guaranteed by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

I shall also enter an Order requiring WestPac to post a remedial notice to employees and to take certain other affirmative action to remedy its unlawful discharges and other discriminations against the 11 employees named earlier and its unlawful refusal to hire or consider for hire the 29 other applicants referred to earlier. As to the 11 named employees who were unlawfully discharged, my Order requires WestPac to offer them reinstatement and make them whole for any loss of earnings and other benefits occasioned by their unlawful discharges, with interest, to be computed on a quarterly basis from the dates of their effective discharges, as found in previous sections, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

With respect to the group of 29 previously identified applicants whom WestPac unlawfully refused to hire or consider for hire, my order requires WestPac to give each of them

nondiscriminatory consideration for hire to current and future jobs, and to make them whole by paying backpay and interest thereon under *New Horizons*, supra, to any such applicants whom it would have hired but for its unlawful conduct, with the identities of such applicants and the amounts to be paid to them to be determined at the compliance stage. *Ultrasystems Western Constructors*, supra, 316 NLRB at 1243; see also *KRI Constructors*, supra.[127]

My Order further contemplates that WestPac shall pay certain additional make-whole amounts, with interest thereon under *New Horizons*, supra, to the eight former strikers, as follows: Inasmuch as I have found that WestPac, after knowing of their unconditional offers to return from the first and second strikes, unlawfully delayed the reinstatement of those returnees in each case, my Order contemplates that WestPac will them whole for the wages they lost from the point they unconditionally offered to return from each of those strikes to the dates of their actual reinstatements. *Northern Wire Corp*., supra, 291 NLRB 727 at fn. 4. Moreover, inasmuch as I have found that, after reinstating participants in the first strike to the Burlington job, WestPac unlawfully refused to give them the same opportunities for overtime work, my Order contemplates that WestPac will make them whole for the wages they lost due to such discrimination. Finally, inasmuch as I have found that, upon reinstating Hill and White at Texaco, WestPac similarly denied them work opportunities made available to nonstrikers, new hires, and transferees from other projects, my Order contemplates that they shall be made whole for the wages they lost due to such discriminations.

[Recommended Order omitted from publication.]

[127] In calculating any possible backpay due to Local 46 Agent Grunwald under this Order, Grunwald may not be made whole for any presumed loss of work opportunities during periods when employees were striking against WestPac with the support of Local 191 and the other Unions. See *Sunland Construction Co*., supra, where the Board held that ''an employer can refuse to hire, during [a strike], an agent of the striking union[,]'' because of the ''conflict between an employer's interest . . . in operating during a strike and a striking union's evident interest in persuading employees not to help it operate.'' 309 NLRB at 1231. See also *Ultrasystems Western Contractors*, supra, 310 NLRB at 546 fn. 5. This latter exception will not apply to IBEW organizer Walsh, whose application was filed after these strikes ended.